

JUDICIAL HANDBOOK

ON

ENVIRONMENTAL CONSTITUTIONALISM

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JUDICIAL HANDBOOK

on

Environmental Constitutionalism

By

James R. May and Erin Daly

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Judicial Handbook on Environmental Constitutionalism – English

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-- James R. May & Erin Daly

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Introduction

This Handbook is designed to provide jurists with an overview of environmental constitutionalism: we address what it is, the peculiar practical and procedural issues it presents, and how courts from around the globe have engaged it. Environmental constitutionalism is a relatively recent phenomenon at the confluence of constitutional law, international law, human rights, and environmental law. It embodies the recognition that the environment is a proper subject for protection in constitutional texts and for vindication by constitutional courts worldwide. Environmental constitutionalism offers one way to engage environmental challenges that fall beyond the grasp of other legal constructs. It can be coalescent, merging governmental structures and individual rights modalities in furtherance of individual or collective norms and policies. It can be deployed to protect local concerns, such as access to fresh food, water or air, or global concerns like biodiversity and climate change that share elements of both human rights and environmental protection. Environmental constitutionalism offers a way forward when other legal mechanisms fall short.

Environmental constitutionalism is variable, manifesting into substantive rights, procedural rights, directive policies, reciprocal duties, or combinations of these and other attributes. Some aspects are fairly common. For example, about one-half of the countries of the world expressly or impliedly recognize a constitutional right to a quality environment. About the same number impart a corresponding duty on individuals to protect the environment.

Some provisions are quite specific, such as those that provide for rights of nature, or rights to potable water or other natural resources. Some are more ephemeral, recognizing trust responsibilities over natural resources or toward future generations, or addressing related subjects like sustainability or climate change. Some recognize environmental stewardship as a matter of national policy.

While most constitutional provisions addressing environmental concerns are narrative, some incorporate numerical outcomes, such as maintaining a percentage of prescribed tree cover, including Bhutan (60 percent) and Kenya (10 percent).

There is also an uptick in provisions that are designed to afford special process rights in environmental matters. Environmental procedural rights normally involve requirements for environmental assessment, access to information, or rights to petition or participate. Such rights help to keep countervailing substantive rights vital. A constitutional guarantee to a beneficial environment is more likely to take root when stakeholders have the right to receive free and timely information, participate in deliberations, and judicially challenge environmental decisionmaking. Procedural environmental constitutionalism is also important in its own right, and

can be as or more efficacious than substantive environmental rights because courts are more likely to impart additional process than to impose substantive remedies.

Some countries incorporate most or all of environmental constitutionalism, including Brazil, while others eschew it entirely. Most countries fall somewhere in between. The variety of provisions, aiming to protect different aspects of the environment with a range of scaffolding and enforcement mechanisms, attests to the growth of environmental constitutionalism throughout the world in number and relevance.

Environmental constitutionalism is growing at the subnational level too, filling gaps in federal systems. Most prominently by states in the Americas in general, and Brazil in particular, subnational governments around the globe have seen fit to constitutionalize substantive and procedural environmental rights, environmental duties, and sustainable development for present and future generations, often with much more specificity and enforceability than provided in national constitutions. Subnational instantiation of constitutional environmental rights can also hold special salience in countries that have yet to recognize environmental rights at the federal level.

Environmental constitutionalism is an essential node in the web of national management of the environment, along with national statutory schemes such as environmental impact assessments and water framework legislation, adherence to international, multilateral and regional treaties and norms, and dialogue with subnational and local governments. As a result, it can provide an imprimatur to ensure and promote complementarity of different regimes at the various levels of governance. Indeed, incorporation of environmental rights, protections and procedures has salutary effects that transcend judicial outcomes. Countries that have adopted environmental constitutionalism have been shown to have smaller per capita ecological footprints, have higher performance on several indicators of environmental indicators, be more likely to ratify international environmental agreements. There is also some evidence that environmental constitutionalism promotes domestic environmental laws and regulations, and may also be the culmination of, and not the precursor to, domestic environmental laws. In sum, environmental constitutionalism is integral, not substitutive: it supports and scaffolds existing international and national legal systems. It advances constitutionalism generally and is a fitting subject for judicial consideration and examination.

Indeed, environmental constitutionalism is playing an ever more prominent complementary and supplementary role in addressing the sorts of environmental problems felt most acutely by those often ignored or underserved by existing legal structures. Extant international and domestic laws and legal structures do not, in and of themselves, ensure either environmental human rights or environmental protection. International treaties, principles and custom do little to advance environmental rights at the local and subsidiary level. There is as of yet no global environmental rights treaty. Moreover, multilateral and bi-lateral treaties that address environmental concerns are often of limited if any utility to individuals. And while

domestic statutory and regulatory law affording environmental protection and resource conservation are quite advanced in many nations, these laws seldom aim to advance environmental rights. In addition, while international human rights regimes most nearly approach the notion that individuals have a fundamental right to a quality environment, they are also often out of reach to individuals who would gain from the recognition of environmental rights at the constitutional level. Environmental constitutionalism can help to bridge the gaps left by these other legal regimes.

The Handbook has five chapters, each addressing subjects that jurists are likely to consider when hearing claims involving constitutional environmental provisions.

Chapter 1 surveys how environmental constitutionalism is exhibited at the national and subnational levels around the globe, including substantive, procedural and other provisions.

Chapter 2 considers issues that affect whether constitutionally-recognized environmental rights are justiciable, including standing, causes of action, timing and defenses, and presumptions about enforceability.

Chapter 3 examines special issues in adjudicating constitutional environmental claims, including textual interpretation, especially of provisions that purport to guarantee a fundamental right to an adequate environment.

Chapter 4 discusses judicially-imposed remedies for violations of constitutional environmental rights.

The Handbook concludes by exploring the particular and sometimes peculiar challenges and opportunities that environmental constitutionalism presents jurists.

Each chapter concludes with excerpts from corresponding judicial decisions from around the globe. To allow the reader to see these cases holistically, we have for the most part left them in their original full-text form. The Handbook concludes with some sample constitutional provisions and a bibliography of cases, statutes and legal scholarship referenced within these pages. We hope that you find this handbook to be a useful resource.



Chapter 1: The Role of the Judiciary in Environmental Constitutionalism

The current state of affairs ... reveals a wholesale failure of the legal system to protect humanity from the collapse of finite natural resources by the uncontrolled pursuit of short-term profits [T]he modern judiciary has enfeebled itself to the point that law enforcement can rarely be accomplished by taking environmental predators to court. ... The third branch can, and should, take another long and careful look at the barriers to litigation created by modern doctrines of subject-matter jurisdiction and deference to the legislative and administrative branches of government.” (Juliana v. Obama (D. Or. 2016), citing Alfred T. Goodwin, *A Wake-Up Call/or Judges*, 2015 Wis. L. Rev. 785, 785-86, 788 (2015).

Whether or not they explicitly protect the environment, modern constitutions typically establish judicial institutions to give effect to constitutional rights and norms, whether in specialized constitutional courts, environmental tribunals, or through diffuse systems of judicial review. More than their international counterparts, these

tribunals tend to be more easily accessible to putative plaintiffs, who are more likely to have better access to local lawyers who, in turn, are more likely to have expertise in the relevant legal fields and to know the legal and political landscape against which judges make their decisions. National courts are dedicated to enforcing constitutional values and yet, as noted, operate within their national political culture rather than outside of it, as is the case with international or regional bodies. Domestic judges are also more likely to understand the significance of a particular environmental claim—or of the countervailing claims—because they are part of the culture from which the claims emerge. As a result, the judicial response to an environmental claim, even if on some occasions it is outside the mainstream, is likely to be within the realm of local political possibility. This contributes to a more coherent and culturally relevant development of the law that in turn is more likely to be followed by other judges and to be accepted by the relevant stakeholders. And although judges in many countries can be relatively immune from political accountability, there is in the domestic sphere at least the greater possibility or threat of accountability than exists with international and regional tribunals. Moreover, given the enhanced concern that international tribunals have for uniformity and the deference they owe to their national constituencies, constitutional courts may be better able than their international counterparts to adjust requirements for standing, or develop different evidentiary requirements, or standards of proof for environmental claims.

National apex and constitutional courts are issuing consequential results in environmental constitutionalism with more frequency, sometimes in ways that are breathtaking in breadth and depth. Yet adjudicating environmental constitutionalism can be complex and riddled with obstacles. The reasons are multifaceted. These begin with the language of the operative phrase, which invariably triggers orbiting issues of what is protected, who can protect it, what constitutes an offense, and who is responsible for making things better. Most provisions require significant judicial interpretation, the most momentous of which is providing a principled definition of 'environment.' Indeed, 'environment' can be virtually limitless, affecting human lives, dignity, health, housing, access to food and water, and livelihood, and so on. But it can also be biocentric, encompassing flora, fauna, and so on. Yet the term 'environment' is rarely if ever defined, so that it is not clear whether it includes air, water, soil, or any combination of these.

The adjectival examination is as daunting. While there may be daylight between an environment that is "beneficial," or "adequate," or "healthful," or "quality," jurists are often reluctant to describe it. Nor is the scope of the right delimited or defined. Consequently it is often up to the courts to determine what it means for the environment to achieve these ends and by whose perspective and how those qualities should be measured.

Identifying appropriate constitutional parties is another challenge. In some countries, the guarantee is for the benefit of people's health or their prosperity, while in others, the right extends to nature itself. Courts have also held private parties accountable for violations of constitutionally embedded environmental rights provisions. The question of identifying proper defendants may turn on the proper definition of the

right but it is further complicated because it implicates questions of sovereignty, immunity, extra-territoriality, and the horizontal application of constitutional rights.

Identifying the appropriate constitutional remedy can be problematic, too. In most constitutional litigation, the question of remedies is relatively straightforward. Even in some environmental cases, where the defendant's action caused the plaintiff's injury, courts have ordered the defendant to cease or to pay damages sufficient to cover the costs of medical care or the loss of employment income, for instance. Remedying constitutional violations involving environmental matters, however, invariably presents difficult and far-reaching policy choices that are challenging to judicial resolution. And, when government changes its policy to enhance the environment, it is private individuals who bear the burden even if they indirectly benefit from improved environmental quality. In addition, once plaintiffs have effectively invoked judicial authority, the burdens of enforcement can be enormous.

Political realities affect outcomes, too. Most courts are keenly aware of the limitations of their own power—of the fact, namely, that most courts generally have no particular resource other than their own legitimacy to ensure respect for or compliance with judicial orders. Eloquent exposition alone cannot change a societal structure that does not recognize the rule of law, for example, or that values development and economic progress at least as much as environmental protection.

The breadth of these provisions, which is typical for environmental rights generally, leaves wide berth for the spectrum of judicial engagement, including vindication, indecision, abstention, and cynicism. The complexities are not simply matters of definition. Rather, they inhere in the nature of environmental rights, especially at the constitutional level. Vindicating environmental rights presents even more fundamental questions of policy choices. In some ways, environmental rights are similar to other social and economic rights that are routinely vindicated in the world's courts in that remedying their violation often entails expenditure of significant resources, but environmental rights often pit the human rights claims against each other. Protecting the environment can help preserve the way of life for some, but it can impair the way of life for others. The problem is one of proportion requiring careful balancing. The judgment of how to balance the competing claims is one that should typically be done politically and not judicially. But of course, staying out of the fray has substantive consequences that sustain the continued deterioration of the environment: where there is no judicial resolution, the harm may be irremediable.

Adjudicating environmental constitutionalism can also invert the normal expectations relating to the roles of public and private parties. Whereas traditional constitutional rights litigation pits the private individual against the public authority, environmental litigation often pits members of the public against a private entity (thus invoking the principle of the horizontal application of constitutional rights and obligations). Moreover, in many of these cases, private individuals are asserting public rights, whereas the government (through lenient regulation and licensing) is facilitating private gain.

Despite these challenges, the jurisprudence surrounding environmental constitutionalism is gaining salience around the globe. Throughout Latin America, as well as in India and neighboring countries and in Central Europe, courts are increasingly vindicating rights in a wide variety of settings, from mining to water and air pollution. And new rights are continually being recognized. In some countries, courts have been willing to expand the universe of possible plaintiffs precisely to enhance the control that the people (via the courts) have over the government. Courts in India, Pakistan, Bangladesh, and Nepal have recognised a form of open standing to vindicate environmental harms on behalf of the public interest. Some courts in Latin America allow amparo actions (or *acciones de inconstitucionalidad*), permitting any citizen to enforce constitutional rights. Courts in the Philippines and Argentina ease or waive standing and bonding requirements for those pursuing public interest litigation to vindicate constitutional environmental rights. Cases from around the globe show that courts are an increasingly potent force in the acceptance and expansion of environmental constitutionalism globally.

Courts have also not shied away from hearing cases in novel realms of environmental constitutionalism, such as concerning water rights. In part this reflects explicit language in so many of the world's constitutions that seeks to protect and manage water resources as an incident of sovereignty, as a human right, or as an essential element of a healthy ecology. And in part, it reflects the growing muscularity of constitutional courts around the world, especially in Southeast Asia and Latin America, where water resources are both threatened and scarce, along with the growing recognition in both national and international arenas of the importance of water to human life and to the world's ecosystems.

Courts have engaged environmental constitutionalism perhaps because they appreciate that through coordination with other parts of government and in dialogue with both the public and private sectors, they can play a pivotal role in securing environmental rights. Indeed, some courts have been extraordinarily creative in designing remedies that are ambitious enough to be effective in remedying the environmental damage, yet defined and limited enough that defendants can implement them.

Environmental constitutionalism's inherent ambiguities may suggest that environmental rights are so laden with policy as to be not justiciable, but better left to legislative bodies. Costs also exacerbate judicial recognition of environmental constitutionalism. And yet, social and economic rights are usually seen as well worth the costs: providing a health benefit to a class of patients or improving educational opportunities for a group of students produces palpable and indispensable benefits.

Environmental protection is problematic on both sides of the cost-benefit ledger. It can be far more costly than the vindication of other rights both in terms of outlays, including the cost of cleaning up toxic sites or large bodies of water, and in terms of lost revenues, where, for instance, a mining or timber license is canceled or where tax revenues from industrial development is foregone. At the same time, environmental constitutionalism can be less palpably beneficial: saving a virgin forest may produce psychic benefits for the population as a whole or for future

generations, but it is unlikely to benefit any particular individual or group of individuals enough to be appreciated, particularly at reelection time. As hard as it is to prove illness from the fact of environmental violations, it is much harder to attribute good health to environmental protection.

There is also the potential that judicial vindication of environmental constitutionalism can contribute to adverse societal outcomes. If protecting against soil or water pollution means closing down a factory or increasing regulation of a whole industry, environmentalists may applaud the result, but poor residents may be less sanguine about it if they lose the jobs and benefits associated with private enterprise investing in the community. And increased poverty can produce environmental degradation of a different but often equally pernicious sort.

Those courts that have engaged these provisions have varied in where they draw the line: some would allow environmental degradation in the name of private rights unless it seems neglectful or vindictive, others have privileged development over almost other interests, while still others have done the opposite, taking a strong stand in favor of the ecological interests of present and future generations. For instance, in invalidating a gold mining and processing license, the highest administrative court in Turkey found it “obvious that the public interest is to be interpreted in favour of human life, if one compares the economic gains attainable upon completion of the activities with the damage that will be caused by the risk to the environment and directly or indirectly to human life.” But it is not, in fact, obvious how the court reached this conclusion, appealing though it may be. The court provided no rubric and referred to no controlling authority. But courts that engage environmental constitutionalism have to draw lines somewhere.. Thus, what starts out as a constitutional right built on aspirations and high principles often becomes, in the hands of courts, a distinctly pragmatic evaluation of costs and benefits, constrained by limited judicial power considered in the face of towering political, economic, and social pressures. While most of these concerns resonate in all constitutional litigation, they are inescapable and particularly salient in constitutional environmental rights cases.

Environmental constitutionalism presents even deeper challenges than other constitutional claims because the particular type of balancing that it demands, some argue, is political and therefore especially unsuited to judicial resolution. The Kenyan Supreme Court explained the challenge of balancing this way: “We do not want a situation where our constitutional terrain on which human and property rights systems are rooted, cultivated and exploited for short term political, economic or cultural gains and satisfaction for a mere maximization of temporary economic returns, based on development strategies and legal arrangements for land ownership use and exploitation without taking account of ecological principles and the centrality of long term natural resources conservation rooted in a conservation national ethic.”

Indeed, judicial discretion in the context of environmental constitutionalism often raises several of the concerns that actually define what is known as the political

question doctrine in American law. As the U.S. Supreme Court explained in *Baker v Carr*, the political question doctrine precludes judicial cognizance of an issue when there is “a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government” among other things. How can a court discern the legal standard embedded in the right “to live in an environment free of pollution?” How could it manage the standard to ensure continuing compliance with its order over time? And how, as a practical matter of judicial politics, could it enforce that judgment against public and private actors who have different views and who are beholden to a public that may be equally divided? Although courts around the world do not typically expressly invoke the American political question doctrine, their reluctance to engage with fundamental environmental rights may be attributable to the same concerns: institutional bodies with frail historical legitimacy and with neither police power nor economic muscle to back up their orders are reluctant to try to force coordinate branches to make radical policy changes.

And yet, courts in many parts of the world have moved beyond this particularly limited way of thinking: throughout Latin America, in Europe, in parts of Africa, and in the Indian sub-continent, courts have engaged not only with environmental constitutionalism but also with other socio-economic rights, including the right to health care, to housing, and to education, in ways that were previously thought of as within the exclusive sphere of political authorities. Equally interesting, these courts have engaged with no less enthusiasm constitutional provisions such as those protecting the right to dignity and the right to life, which are as amorphous and ill-defined as environmental provisions, if not more so. (It is worth noting, however, that while there is significant overlap between the countries whose courts protect environmental rights and those whose courts protect other socio-economic rights, European countries are outliers: the constitutional courts of Europe have tended to protect environmental interests anemically if at all, while giving robust protection to most other socio-economic rights and values.)

To be sure, countries with democratic deficits are likely to be those that lack judicial review as well. But constitutional activity does not thwart democratic discourse or the ability of the people to mark their own paths: democracy is hardly moribund in countries such as South Africa, Colombia, Brazil, India, Israel, Canada, and Germany, all of which have courts that energetically enforce a wide range of constitutional norms. The experiences in these countries suggest the opposite. In part, this is because constitutionalization and its partner, judicialization, do not remove issues from the political process, but rather help to galvanize public discourse by setting the terms of debate.

At most, rights in constitutions provide a sort of ballast or counterweight to other constitutional rights to ensure that particular values get counted in the political calculation. For example, where no countervailing values are at issue, environmental rights will often prevail. But where, as is often the case, other constitutional values such as property are in play, environmental rights must be balanced against those.

As courts construct and reconfigure their roles within developing systems of democratic constitutionalism, the rights they protect become the subject of ongoing political negotiation, rather than falling outside of it. This kind of balancing is likely to be more in line with the political community's values and expectations when it is done by constitutional courts, rather than by international or regional tribunals. . Judges will invariably root their application of equity in the choices of their national collective. Each court will define its own "conservation national ethic" according to the nation's own traditions and needs. It will give meaning to a 'clean' or 'healthy' environment in a way that is consistent with the country's own cultural values or will weigh the value of development against the protection of nature in a way that is tolerable to the competing claimants within the society. This promotes environmental rule of law within the political and legal culture of a country.

Moreover, judicial discretion diminishes over time, as legal principles become settled and case law gives substance to those amorphous terms. When courts implement environmental rights in particular, they tend to import many of the principles and values of environmental law that have become widely accepted throughout the world in similar cases, such as the precautionary principle, the principle that the polluter should pay for the damage, principles of sustainable development and intergenerational equity, and sometimes procedural principles that are unique to environmental litigation including the reversal of the burden of proof and the acceptance of probabilistic evidence. The incremental growth of a body of law through case-by-case application can ensure that the law develops progressively and relatively smoothly over time and this, in turn, increases its acceptance in the local society.

That some constitutional provisions remain underutilized or dormant judicially is perhaps less consequential than it might seem at first blush. Even where courts have not found a constitutional environmental violation, the mere fact that such arguments are being made and considered augments the attention that environmental constitutionalism receives in public discourse. And this, in itself, can contribute to the success of environmental outcomes in meaningful ways. Given the complexity of the issues involved—the necessary involvement of all branches of government as well as a multiplicity of private and public actors in all facets of public life—the judicial role will be necessary, though not sufficient, to implement the progress and protections promised by environmental constitutionalism.

The *Robinson* case, for example, is a potentially important corrective to judicial under-engagement of environmental constitutionalism. Although only a plurality opinion from the Supreme Court of Pennsylvania, it is nonetheless a powerful vindication of constitutional environmentalism and may represent a significant step forward for American constitutional environmental rights in particular. It is particularly noteworthy that the decision was issued in the context of a hugely significant social, economic, and environmental controversy. While this concerns only one state within one country, its impact may be far-reaching if courts in other jurisdictions take notice. In imposing constitutional impediments to hydrofracking, the Court attended to almost every significant issue that courts around the world are

reckoning with, from standing, to questions about self-execution, to interpretation of constitutional provisions, to the public trust doctrine, to enforcement of constitutional environmental provisions. And it did so in a way that takes seriously the environmental interests of the general public and of future generations. It is likely that other courts within and outside the United States will be encouraged to follow suit, even though these views did not command a majority of the Pennsylvania court.

Environmental constitutionalism is pervasive and profound: it furthers the possibilities of constitutional reformation, notions of intergenerational equity, legislative responses to environmental challenges, and the need for policy decisions to be made through open and inclusive processes. Environmental constitutionalism also serves as a proxy for social compacts with present and future generations. While imperfect and imprecise, it gives judges additional tools for advancing the rule of law regarding issues of environmental concern.

The materials that follow provide further context for judicial roles in environmental constitutionalism, beginning with the *Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, followed by leading cases in the field at the national (*Minors Oposa v. Factoran*) and subnational levels (*Robinson Township v. Pennsylvania*).

A. Reference Materials

1. Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment.

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A/HRC/25/53

General Assembly

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Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment

John H. Knox

Mapping report

Summary

This report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment is submitted to the Human Rights Council in accordance with Council resolution 19/10.

The report maps human rights obligations relating to the environment, on the basis of an extensive review of global and regional sources. The Independent Expert describes procedural obligations of States to assess environmental impacts on human rights and to make environmental information public, to facilitate participation in environmental decision-making, and to provide access to remedies for environmental harm. He describes States' substantive obligations to adopt legal and institutional frameworks that protect against environmental harm that interferes with the

enjoyment of human rights, including harm caused by private actors. Finally, he outlines obligations relating to the protection of members of groups in vulnerable situations, including women, children and indigenous peoples.

I. Introduction

1. In its resolution 19/10, the Human Rights Council decided to appoint an Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment. In March 2013, the Independent Expert submitted a scoping report to the Council that described the evolution of the relationship between human rights and the environment (A/HRC/22/43). The report explained that the principal goal of the Independent Expert in the second year of his mandate would be to map human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment.
2. To that end, the Independent Expert carried out extensive research and held four regional consultations, in Nairobi, Geneva, Panama City and Copenhagen. (The Copenhagen consultation was with individuals from countries in Asia and Europe.) The consultations enabled the Independent Expert to hear the views of interested stakeholders, including Governments, international bodies, national human rights institutions, civil society organizations, the private sector and academic institutions. Each of the consultations addressed a particular theme: procedural rights and duties, substantive rights and duties, members of groups in vulnerable situations, and the integration of human rights and the environment into international institutions.
3. Section II of the present document describes the mapping process in more detail, section III identifies human rights threatened by environmental harm, and section IV describes human rights obligations relating to the environment.

II. Mapping human rights obligations relating to the environment

4. In order to fulfil the request made by the Human Rights Council in its resolution 19/10 that the Independent Expert “study the human rights obligations, including nondiscrimination obligations, relating to the enjoyment of a safe, clean, healthy and sustainable environment,” he reviewed a wide range of sources of human rights law. Scholars had previously examined some, but not all, of these sources. While recognizing the importance of the previous scholarly work, the Independent Expert undertook a fresh examination of the primary materials. To ensure that the study was as thorough as possible, he sought and received substantial pro bono assistance from academics and international law firms. With their help, thousands of pages of materials were reviewed, including texts of agreements, declarations and resolutions; statements by international organizations and States; and interpretations by tribunals and treaty bodies.
5. The relevant statements are described in 14 reports, each devoted to a particular source or set of sources. Before being finalized, the reports were edited in light of the

regional consultations and were reviewed by outside experts. The reports are available both at the OHCHR website¹ and the Independent Expert's personal website.²

III. Human rights threatened by environmental harm

6. In his first report, the Independent Expert stated that one “firmly established” aspect of the relationship between human rights and the environment is that “environmental degradation can and does adversely affect the enjoyment of a broad range of human rights” (A/HRC/22/43, para. 34). As the Human Rights Council itself has stated, “environmental damage can have negative implications, both direct and indirect, for the effective enjoyment of human rights” (resolution 16/11). The mapping project provides overwhelming support for this statement. Virtually every source reviewed identifies rights whose enjoyment is infringed or threatened by environmental harm.

7. For example, in the universal periodic review process, 45 States discussed the right to a healthy environment as recognized in their constitutions, and several identified threats to the enjoyment of this right, including climate change, desertification, and particular mining operations.² In addition, African tribunals have held that large-scale oil development infringed the right to a satisfactory environment as protected by the African Charter.³

8. The Human Rights Committee has asked States to describe measures they have taken to protect the right to life from the risk of nuclear disaster and other environmental pollution.⁴ This right, like others, can be affected by natural causes as well as by human actions: the European Court of Human Rights has decided cases involving infringement of the right to life that occurred as a result of natural disasters and also as a result of improper maintenance of a municipal rubbish tip that caused a massive explosion.⁵

9. Many sources, including the Human Rights Council, the Committee on Economic, Social and Cultural Rights, the special rapporteurs, the African Commission and the European Committee of Social Rights have identified environmental threats to the right to the enjoyment of the highest attainable standard of physical and mental health. Examples include the improper disposal of toxic wastes (Human Rights Council resolution 9/1; E/CN.4/2004/46, para. 79), exposure to radiation and harmful chemicals (Committee on Economic, Social and Cultural Rights, general comment No. 14 (2000), para. 15), oil pollution (African Commission, *Ogoniland* case, para. 54), and large-scale water pollution.⁶

10. In addition, many sources have identified environmental threats to the right to an adequate standard of living and its components. For example, the Committee on Economic, Social and Cultural Rights has identified the improper use of pesticides as a

¹ <http://www.ohchr.org/EN/Issues/Environment/IEEnvironment/Pages/IEEnvironmentIndex.aspx> ² <http://ieenvironment.org>

² Individual report on the General Assembly and the Human Rights Council, including the universal periodic review process, sect. III.A.

³ Communication No. 155/96, *Social and Economic Rights Action Centre v. Nigeria* (Ogoniland case); *SERAP v. Nigeria*, Court of Justice of the Economic Community of West African States, Judgement No. ECW/CCJ/JUD/18/12 (14 December 2012).

⁴ International Covenant on Civil and Political Rights (ICCPR) report, sect. II.

⁵ European report, pp. 4–5; and Council of Europe, *Manual*, pp. 35–37.

⁶ European Committee of Social Rights, complaint No. 72/2011, *International Federation for Human Rights (FIDH) v. Greece* (2013). CESCR report, sect. II.

threat to the right to food,⁸ while the Special Rapporteur on the right to food has found that right to be threatened by pollution and habitat loss (A/67/268, paras. 17–19). The Special Rapporteur on hazardous substances and wastes has indicated that waste from extractive industries can infringe the right to water (A/HRC/21/48, para. 39), and the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context has described how that right is threatened by climate change (A/64/255).

11. Indeed, special rapporteurs have explained how climate change threatens a wide range of rights, including the rights to health, water and food.⁷ An OHCHR report describes the implications of climate change for those rights and others, including the right of self-determination for peoples living in small island States (A/HRC/10/61). The Human Rights Council took note of the report and expressed its concern that “climate change poses an immediate and far-reaching threat to people and communities around the world and has adverse implications for the full enjoyment of human rights” (resolution 18/22).

12. The Human Rights Council has recognized that “environmental damage is felt most acutely by those segments of the population already in vulnerable situations” (resolution 16/11). The sources reviewed provide examples of environmental harm that particularly affects such groups. For example, the Committee on the Elimination of Discrimination against Women has identified many types of environmental harm, including natural disasters, climate change, nuclear contamination and water pollution, that can adversely affect rights protected under the Convention on the Elimination of All Forms of Discrimination against Women.⁸ The Special Rapporteur on hazardous substances and wastes has highlighted the particular dangers that exposure to mercury through artisanal mining poses to women in respect of their right to health (A/HRC/21/48, paras. 32, 33).

13. The rights of children, too, may be particularly affected by environmental degradation. The Convention on the Rights of the Child states that environmental pollution poses “dangers and risks” to nutritious foods and clean drinking water (art. 24, para. 2(c)). In its concluding observations on country reports, the Committee on the Rights of the Child regularly addresses environmental hazards as barriers to the realization of the right to health and other rights.⁹ The Special Rapporteur on hazardous substances and wastes has emphasized the harm to children’s rights to health caused by exposure to mercury and other hazardous substances in extractive industries (A/HRC/21/48, paras. 28–30).

14. Because of the close relationship that indigenous peoples have with nature, they can be uniquely vulnerable to environmental degradation. The Special Rapporteur on the rights of indigenous peoples has emphasized that “extractive industry activities generate effects that often infringe upon indigenous peoples’ rights” (A/HRC/18/35, para. 26), and has detailed many examples of such infringement, including on their rights to life, health and property.¹⁰

⁷ Report on special procedures, sect. II. See also the joint statement by the special procedures mandate holders regarding the United Nations Climate Change Conference, available at <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=9667&LangID=E>.

⁸ Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) report, sect. II.

⁹ Convention on the Rights of the Child (CRC) report, sect. II.

¹⁰ Report on indigenous peoples, sect. II. See also the International Convention on the Elimination of

IV. Human rights obligations relating to the environment

15. This section sets out human rights obligations relating to the environment as they have been described by international agreements and the bodies charged with interpreting them. Although only some of these agreements explicitly refer to the environment, human rights bodies have increasingly applied them to environmental issues in recent years as our knowledge of the dangers of environmental degradation has increased. The result is a large and growing number of legal statements that together create a body of human rights norms relating to the environment.

16. The Independent Expert understands that not all States have formally accepted all of these norms. While some of the statements cited are from treaties, or from tribunals that have the authority to issue decisions that bind the States subject to their jurisdiction, other statements are interpretations by experts that do not in themselves have binding effect. Despite the diversity of the sources from which they arise, however, the statements are remarkably coherent. Taken together, they provide strong evidence of converging trends towards greater uniformity and certainty in the human rights obligations relating to the environment. These trends are further supported by State practice reflected in the universal periodic review process and international environmental instruments.

17. In this light, the Independent Expert encourages States to accept these statements as evidence of actual or emerging international law. At a minimum, they should be seen as best practices that States should move to adopt as expeditiously as possible.

A. Procedural obligations

18. One of the most striking results of the mapping exercise is the agreement among the sources reviewed that human rights law imposes certain procedural obligations on States in relation to environmental protection. They include duties (a) to assess environmental impacts and make environmental information public; (b) to facilitate public participation in environmental decision-making, including by protecting the rights of expression and association; and (c) to provide access to remedies for harm. These obligations have bases in civil and political rights, but they have been clarified and extended in the environmental context on the basis of the entire range of human rights at risk from environmental harm.

1. Duties to assess environmental impacts and make information public

19. The Universal Declaration of Human Rights (art. 19) and the International Covenant on Civil and Political Rights (art. 19) state that the right to freedom of expression includes the freedom “to seek, receive and impart information”. The right to information is also critical to the exercise of other rights, including rights of participation. In the words of the then Special Rapporteur on the adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights, the rights to information and participation are “both rights in themselves and essential tools for the

All Forms of Racial Discrimination (ICERD) report, sect. II; and Inter-American report, sect. III.C.

exercise of other rights, such as the right to life, the right to the highest attainable standard of health, the right to adequate housing and others” (A/HRC/7/21, p. 2).

20. Human rights bodies have repeatedly stated that in order to protect human rights from infringement through environmental harm, States should provide access to environmental information and provide for the assessment of environmental impacts that may interfere with the enjoyment of human rights.

21. For example, in its general comment No. 15 (2002) on the right to water, the Committee on Economic, Social and Cultural Rights stated that individuals should be given full and equal access to information concerning water and the environment (para. 48), and in its responses to country reports, it has urged States to assess the impacts of actions that may have adverse environmental effects on the right to health and other rights within its purview.¹¹ Similarly, the Special Rapporteur on the situation of human rights defenders has stated that information relating to large-scale development projects should be publicly available and accessible (A/68/262, para. 62), and the Special Rapporteur on the human right to safe drinking water and sanitation has stated that States need to conduct impact assessments “in line with human rights standards” when they plan projects that may have an impact on water quality (A/68/264, para. 73).¹²

22. Regional bodies have also concluded that States must provide environmental information and provide for assessments of environmental impacts on human rights.

23. International instruments illustrate the importance of providing environmental information to the public. Principle 10 of the Rio Declaration states: “At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities... States shall facilitate and encourage public awareness and participation by making information widely available.”¹³ Many environmental treaties . . . require environmental information to be provided to the public. The Aarhus Convention includes particularly detailed obligations.¹⁴ . . .

24. Most States have adopted environmental impact assessment laws, in accordance with principle 17 of the Rio Declaration, which states that “environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority.” The World Bank requires environmental assessment of all Bank-financed projects to “ensure that they are environmentally sound and sustainable”.¹⁵

2. Duties to facilitate public participation in environmental decision-making

¹¹ ICESCR report, sect. III.A.1.

¹² For other statements by special rapporteurs on access to information and assessment of environmental impacts, see Report on special procedures, sect. III.A.1.

¹³ See also: “Guidelines for the development of national legislation on access to information, public participation and access to justice in environmental matters” adopted at the eleventh special session of the United Nations Environment Programme Governing Council/Global Ministerial Environmental Forum.

¹⁴ For other examples, see the Multilateral environment agreements (MEA) report, sect. III.A.1.

¹⁵ World Bank Operational Policy 4.01, para. 1. See also: World Bank Inspection Panel, Report No. 40746-ZR, 31 August 2007, para. 346 (finding that the failure to prepare an environmental assessment violated the Operational Policy).

25. The baseline rights of everyone to take part in the government of their country and in the conduct of public affairs are recognized in the Universal Declaration of Human Rights (art. 21) and the International Covenant on Civil and Political Rights (art. 25), respectively. Again, human rights bodies have built on this baseline in the environmental context, elaborating a duty to facilitate public participation in environmental decisionmaking in order to safeguard a wide spectrum of rights from environmental harm.

26. . . . Regional human rights tribunals agree that individuals should have meaningful opportunities to participate in decisions concerning their environment.¹⁶

27. The need for public participation is reflected in many international environmental instruments. Principle 10 of the Rio Declaration states: “Environmental issues are best handled with participation of all concerned citizens, at the relevant level... Each individual shall have... the opportunity to participate in decision-making processes.” In 2012, in *The Future We Want*, the outcome document of the United Nations Conference on Sustainable Development (Rio+20 Conference), States recognized that “opportunities for people to influence their lives and future, participate in decision-making and voice their concerns are fundamental for sustainable development” (A/CONF.216/16, para. 13). . . . The Aarhus Convention has particularly detailed requirements (arts. 6–8).¹⁷

28. The rights of freedom of expression and association are of special importance in relation to public participation in environmental decision-making. The Special Rapporteur on the situation of human rights defenders has said that those working on land rights and natural resources are the second-largest group of defenders at risk of being killed (A/HRC/4/37), and that their situation appears to have worsened since 2007 (A/68/262, para. 18). Her last report described the extraordinary risks, including threats, harassment, and physical violence, faced by those defending the rights of local communities when they oppose projects that have a direct impact on natural resources, the land or the environment (A/68/262, para. 15).

29. States have obligations not only to refrain from violating the rights of free expression and association directly, but also to protect the life, liberty and security of individuals exercising those rights.¹⁸ There can be no doubt that these obligations apply to those exercising their rights in connection with environmental concerns. . . .

3. Duty to provide access to legal remedies

30. From the Universal Declaration of Human Rights onward, human rights agreements have established the principle that States should provide for an “effective remedy” for violations of their protected rights. Human rights bodies have applied that principle to human rights infringed by environmental harm. . . . The Special Rapporteur on the situation of human rights defenders has stated that States must implement mechanisms that allow defenders to communicate their grievances, claim responsibilities, and obtain effective redress for violations, without fear of intimidation (A/68/262, paras. 70–73). Other special

¹⁶ Regional agreements report, sect. II.B.1; Inter-American report, sect. III.A.2.

¹⁷ MEA report, sect. III.A.2.

¹⁸ International Covenant on Civil and Political Rights, art. 2; Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, arts. 2, 9 and 12.

rapporteurs, including those for housing, education, and hazardous substances and wastes, have also emphasized the importance of access to remedies within the scope of their mandates.¹⁹

31. At the regional level, the European Court has stated that individuals must “be able to appeal to the courts against any decision, act or omission where they consider that their interests or their comments have not been given sufficient weight in the decision-making process.”²⁰ More generally, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights have stated that the American Convention on Human Rights requires States to provide access to judicial recourse for claims alleging the violation of their rights as a result of environmental harm.²¹ The Court of Justice of the Economic Community of West African States has stressed the need for the State to hold accountable actors who infringe human rights through oil pollution, and to ensure adequate reparation for victims.²⁴

32. International environmental instruments support an obligation to provide for effective remedies. Principle 10 of the Rio Declaration states: “Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.” . . .

B. Substantive obligations

33. States have obligations to protect against environmental harm that interferes with the enjoyment of human rights. As section II explains, environmental harm may threaten a very broad spectrum of human rights, including the rights to life and health. The content of States’ specific obligations to protect against environmental harm therefore depends on the content of their duties with respect to the particular rights threatened by the harm.

34. Those duties may vary from right to right. For example, States have general obligations to respect and ensure rights under the International Covenant on Civil and Political Rights (art. 2, para. 1), the Convention on the Rights of the Child (art. 2, para. 1) and the American Convention on Human Rights (art. 1), to take steps towards the full realization of the rights recognized in the International Covenant on Economic, Social and Cultural Rights, to secure the rights in the European Convention on Human Rights (art. 1), and to recognize and give effect to the rights in the African Charter (art. 1). When environmental harm threatens or infringes the enjoyment of a right protected by one or more of these agreements, States’ general obligations relating to the right (e.g. to respect and ensure it, or to take steps towards its full realization) apply with respect to the environmental threat or infringement.

35. Despite differences in the language setting out the general obligations, however, they have given rise to remarkably similar interpretations when applied to environmental issues. Although the contours of the specific environmental obligations are still evolving, some of their principal characteristics have become clear. In particular, States have obligations (a) to adopt and implement legal frameworks to protect against environmental

¹⁹ Report on special procedures, sect. III.A.3.

²⁰ *Taşkin v. Turkey*, para. 119.

²¹ Inter-American report, sect. III.A.3. ²⁴ *SERAP v. Nigeria*, para. 97.

harm that may infringe on enjoyment of human rights; and (b) to regulate private actors to protect against such environmental harm.

1. *Obligation to adopt and implement legal framework*

36. States have obligations to adopt legal and institutional frameworks that protect against, and respond to, environmental harm that may or does interfere with the enjoyment of human rights. These obligations have been derived from a number of human rights, including the rights to life and health.

37. The Human Rights Committee has long held the view that the right to life protected by the International Covenant on Civil and Political Rights “cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures” (general comment No. 6 (1982) on the right to life, para. 5). Although the Committee has not described in detail the steps required to protect the right to life from environmental harm, other human rights bodies have. In particular, the European Court has held that States have a primary duty to put in place a legislative and administrative framework that protects against and responds to infringements of the right to life as a result of natural disasters and of dangerous activities, including the operation of chemical factories and waste-collection sites.²² The Inter-American Commission on Human Rights has also urged States to adopt environmental protection measures in order to comply with their obligations to protect rights, including the rights to life and health.²⁶ . . .

38. States have recognized the importance of incorporating human rights considerations into environmental laws. The Human Rights Council has affirmed that “human rights obligations and commitments have the potential to inform and strengthen international, regional and national policymaking in the area of environmental protection” and urged States “to take human rights into consideration when developing their environmental policies” (resolution 16/11). . . . In the universal periodic review process, many States have described the steps they have taken to create institutions and adopt policies and laws to address environmental protection.²³

39. The obligation to protect human rights from environmental harm does not require the cessation of all activities that may cause any environmental degradation. The African Commission, for example, has made it clear that the African Charter does not require States to forego all oil development.²⁴ The European Court has held that States have discretion to strike a balance between environmental protection and other issues of societal importance, such as economic development and the rights of others.²⁵ But the balance cannot be unreasonable, or result in unjustified, foreseeable infringements of

²² Council of Europe, *Manual*, pp. 18, 36–40. See, for example, *Öneryıldız v. Turkey*, No. 48939/99, 30 November 2004; and *Budayeva and others v. Russia*, No. 15339/02, 20 March 2008. The European Court has also derived such an obligation from the right to private and family life; see *Tatar v. Romania*, No. 67021/01, 6 July 2009, para. 88. ²⁶ See Inter-American report, sect. III.B.

²³ Individual report on the General Assembly and the Human Rights Council, including the universal periodic review process, sect. IV.B.1.

²⁴ *Ogoniland* case, para. 54.

²⁵ Council of Europe, *Manual*, p. 20. See, for example, *Hatton and others v. United Kingdom*, No. 360022/97, 8 July 2003, para. 98.

human rights. In the *Ogoniland* case, the African Commission cited the enormous environmental harm to the rights of those in the Niger delta region in finding that “the care that should have been taken”, including by taking reasonable measures to prevent pollution and ecological degradation from oil production, “was not taken.”²⁶ Similarly, the European Court has decided cases in which it held that States failed to strike a fair balance between protecting rights from environmental harm and protecting other interests.²⁷

40. In this respect, national and international health standards may be particularly relevant. For example, in deciding whether a State had failed to comply with its obligations under the European Social Charter with respect to the right to health, the European Committee of Social Rights evaluated the danger posed by water pollution in light of water safety standards set by the World Health Organization (WHO) and other public bodies.²⁸ The European Court has also considered national and WHO health and safety standards in deciding whether States have reached a fair balance between environmental protection and other interests.²⁹

41. Another relevant factor in deciding whether an environmental law meets human rights obligations is whether it is retrogressive. The Committee on Economic, Social and Cultural Rights has strongly discouraged retrogressive actions with respect to fulfilment of the rights protected by the International Covenant, in light of the obligation in the Covenant to move as expeditiously as possible towards full realization of the rights. The Committee stated in its general comment on the right to the highest attainable standard of health that “as with all other rights in the Covenant, there is a strong presumption that retrogressive measures taken in relation to the right to health are not permissible.” If States do take deliberately retrogressive measures, then they have the burden of proving that they first carefully considered all alternatives, and that the measures “are duly justified by reference to the totality of the rights provided for in the Covenant in the context of the full use of the State party’s maximum available resources” (para. 32).³⁰

42. Finally, after a State has adopted environmental standards into its law, it must implement and comply with those standards. As the European Court has stated: “Regulations to protect guaranteed rights serve little purpose if they are not duly enforced.”³¹ Interpreting the African Charter, the Court of Justice of the Economic Community of West African States has held that it is not enough to adopt measures “if these measures just remain on paper and are not accompanied by additional and concrete measures aimed at preventing the occurrence of damage or ensuring accountability, with the effective reparation of the environmental damage suffered.”³² In addition, the Committee on Economic, Social and Cultural Rights has made clear that the Covenant obliges States to refrain from “unlawfully polluting air, water and soil, e.g. through industrial waste from State-owned facilities” (general comment No. 14, para. 34) and to

²⁶ *Ogoniland* case, para. 54.

²⁷ See, for example, *López Ostra v. Spain*, No. 16798/90, 9 December 1994; *Tatar v. Romania*, No. 67021/01, 27 January 2009.

²⁸ *International Federation for Human Rights (FIDH) v. Greece*, No. 72/2011, 23 January 2013, paras. 42–44, 148.

²⁹ See, for example, *Dubetska and others v. Ukraine*, No. 30499/03, 10 May 2011, para. 107 (national standards); *Fägerskiöld v. Sweden*, No. 37664/04, 26 February 2008 (WHO standards).

³⁰ See also the Committee’s general comment No. 15, para. 19.

³¹ *Moreno Gómez v. Spain*, No. 4143/02, 16 February 2005, para. 61. See also *Giacomelli v. Italy*, No. 59909/00, 26 March 2007, para. 93.

³² *SERAP v. Nigeria*, para. 105.

refrain from “unlawfully diminishing or polluting water” (general comment No. 15, para. 21).

43. Again, special rapporteurs have taken equivalent positions with respect to rights within the scope of their mandates.³³ For example, the Special Rapporteur on the human right to safe drinking water and sanitation has emphasized that “successful regulation depends not only on standard-setting, but also on strong independent regulators... Regulators need to have the capacity, in terms of human resources, skills, funding and independence from interference, to monitor whether regulations are being complied with, carry out on-site inspections, and impose fines and penalties in the case of breaches” (A/68/264, para. 52).

2. *Obligations to protect against environmental harm from private actors*

44. As the then Special Representative of the Secretary-General on business and human rights explained, “the State duty to protect against non-State abuses is part of the very foundation of the international human rights regime. The duty requires States to play a key role in regulating and adjudicating abuse by business enterprises, or risk breaching their international obligations” (A/HRC/4/35, para. 18). Such abuses can include environmental harm that infringes human rights. The Special Representative reviewed 320 cases of alleged corporate-related human rights abuses and found that nearly one third of the cases alleged environmental harm that affected human rights, including the rights to life, health, food and housing. Most of the cases of direct harm to communities involved environmental impacts (A/HRC/8/5/Add.2, para. 67).

45. The Guiding Principles on Business and Human Rights endorsed by the Human Rights Council in 2011 state that States are required, inter alia, to “protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises,” including by “taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication” (A/HRC/17/31, principle 1). The Guiding Principles also make it clear that States have an obligation to provide for remedies for human rights abuses caused by corporations, and that corporations themselves have a responsibility to respect human rights. These three pillars of the normative framework all apply to environmental human rights abuses such as those described in the earlier report of the Special Representative.

46. Many other human rights bodies have explicitly connected States’ duty to protect against human rights abuses by non-State actors to such abuses caused by pollution or other environmental harm. . . .

47. The African Commission has stated that “Governments have a duty to protect their citizens, not only through appropriate legislation and effective enforcement but also by protecting them from damaging acts that may be perpetrated by private parties”, and has held that by allowing oil companies “to devastatingly affect the well-being of the Ogonis”, the State had “fallen short of the minimum conduct expected of governments.”³⁴ The InterAmerican Commission on Human Rights has stated that “effective enforcement of the environmental protection measures in relation to private parties, particularly extractive

³³ Report on special procedures, sect. III.B (citing statements relating to rights to health, water, food and housing).

³⁴ *Ogoniland* case, paras. 57, 58.

companies and industries... is essential to avoid the State's international responsibility for violating the human rights of the communities affected by activities detrimental to the environment."³⁵ And the European Court has held that States are obligated to take positive steps to protect against environmental harm to the right to private and family life, whether the pollution was caused by governmental or private action. In either case, "the applicable principles are broadly similar."³⁶

3. *Obligations relating to transboundary environmental harm*

48. Many grave threats to the enjoyment of human rights are due to transboundary environmental harm, including problems of global scope such as ozone depletion and climate change. This raises the question of whether States have obligations to protect human rights against the extraterritorial environmental effects of actions taken within their territory.

49. There is no obvious reason why a State should not bear responsibility for actions that otherwise would violate its human rights obligations, merely because the harm was felt beyond its borders. Nevertheless, the application of human rights obligations to transboundary environmental harm is not always clear. One difficulty is that human rights instruments address jurisdiction in different ways. . . .

50. Nevertheless, most of the sources reviewed that have addressed the issue do indicate that States have obligations to protect human rights, particularly economic, social and cultural rights, from the extraterritorial environmental effects of actions taken within their territory. . . .

51. Other sources, such as the Special Representative of the Secretary-General on business and human rights, have taken a more restrictive view of the scope of extraterritorial human rights obligations. The Special Representative also stated, however, that "there is increasing encouragement at the international level... for home States to take regulatory action to prevent abuse by their companies overseas" (A/HRC/8/5, para. 19), and urged States to do more to prevent corporations from abusing human rights abroad (A/HRC/14/27).

52. Although work remains to be done to clarify the content of extraterritorial human rights obligations pertaining to the environment, the lack of complete clarity should not obscure a basic point: States have an obligation of international cooperation with respect to human rights, which is contained not only in treaties such as the International Covenant on Economic, Social and Cultural Rights (art. 2, para. 1), but also in the Charter of the United Nations itself (arts. 55 and 56). This obligation is of particular relevance to global environmental threats to human rights, such as climate change (A/HRC/10/61, para. 99). As the Human Rights Council noted in its resolution 16/11, principle 7 of the Rio Declaration states that "States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem."

³⁵ Inter-American Commission on Human Rights. Second report on the situation of human rights defenders in the Americas, 2011, para. 315. Available at <https://www.oas.org/en/iachr/defenders/docs/pdf/defenders2011.pdf>. See generally IACHR report, sect. IV.A.

³⁶ *Lopez Ostra v. Spain*, No. 16798/90, 9 December 1994, para. 51; *Hatton v. United Kingdom*, No. 36022/97, 8 July 2003, para. 98.

53. Indeed, much of international environmental law reflects efforts by States to cooperate in the face of transboundary and global challenges. Further work to clarify extraterritorial obligations in respect of environmental harm to human rights can receive guidance from international environmental instruments, many of which include specific provisions designed to identify and protect the rights of those affected by such harm.³⁷

C. Obligations relating to members of groups in vulnerable situations

54. The human rights obligations relating to the environment include a general obligation of non-discrimination in their application. In particular, the right to equal protection under the law, which is protected by the Universal Declaration of Human Rights (art. 7) and many human rights agreements, includes equal protection under environmental law.³⁸ States have additional obligations with respect to groups particularly vulnerable to environmental harm. The following sections describe obligations specific to three groups in particular: women, children and indigenous peoples.³⁹

1. Women

55. In construing the Convention on the Elimination of All Forms of Discrimination against Women, the Committee on the Elimination of Discrimination against Women has emphasized that States should ensure that public participation in environmental decisionmaking, including with respect to climate policy, includes the concerns and participation of women.⁴⁰ Similarly, the Special Rapporteur on the right to health has stated that “even though women bear a disproportionate burden in the collection of water and disposal of family wastewater, they are often excluded from relevant decision-making processes. States should therefore take measures to ensure that women are not excluded from decisionmaking processes concerning water and sanitation management” (A/62/214, para. 84).

56. With respect to substantive obligations to develop and implement policies to protect human rights from environmental harm, the Committee has called on States to ensure that the policies are aimed at protecting the rights of women to health, to property and to development. Moreover, it has urged States to conduct research on the adverse effects of environmental contamination of women, and to provide sex-disaggregated data on the effects.⁴¹ Where environmental harm has disproportionate effects on women, States are obliged to adopt and implement programmes accordingly. The Special Rapporteur on hazardous substances and wastes, for example, has stated that “due to the harmful effects of mercury on the female reproduction function, international human rights law requires States parties to put in place preventive measures and programmes to protect women of childbearing age from mercury exposure” (A/HRC/21/48, para. 33, citing the Convention, art. 11, para. 1 (f)).

³⁷ See MEA report, sect. IV.A; and Aarhus report.

³⁸ See Inter-American Commission on Human Rights, *Mossville Action Now v. United States*, No. 43/10, 17 March 2010 (construing article II of the American Declaration).

³⁹ This should not be taken as an exhaustive list of groups in vulnerable situations; on the contrary, other such groups could include minorities, those in extreme poverty and displaced persons. However, these groups have been the subject of the most detailed attention from the sources reviewed.

⁴⁰ CEDAW report, sect. III.A.1.

⁴¹ CEDAW report, sect. III.A.2 and III.B.

57. Some groups of women are particularly vulnerable for various reasons, including because they are poor, older, disabled and/or of minority status, which may give rise to the need for additional protection. For example, in its general recommendation No. 27 (2010) on older women and protection of their human rights, the Committee found that they are particularly vulnerable to natural disasters and climate change (para. 25), and stated that therefore “States parties should ensure that climate change and disaster risk-reduction measures are gender-responsive and sensitive to the needs and vulnerabilities of older women. States parties should also facilitate the participation of older women in decisionmaking for climate change mitigation and adaptation” (para. 35).

2. Children

58. The Convention on the Rights of the Child provides that in all actions concerning children, including those taken by administrative authorities and legislative bodies, “the best interests of the child shall be a primary consideration” (art. 3, para. 1). In its general comment No. 14 (2013), the Committee on the Rights of the Child has made it clear that this provision applies to actions, such as environmental regulation, that affect children as well as other population groups, and it has stated that where decisions “will have a major impact” on children, “a greater level of protection and detailed procedures to consider their best interests is appropriate” (paras. 19, 20).

59. More specifically, article 24.2(c) of the Convention provides that States Parties shall pursue full implementation of the right of the child to the enjoyment of the highest attainable standard of health and, in particular, shall take appropriate measures “to combat disease and malnutrition... through the provision of adequate nutritious foods and clean drinking water, taking into consideration the dangers and risks of environmental pollution.” In its general comment No. 15 (2013), the Committee stated that under article 24.2(c), “States should take measures to address the dangers and risks that local environmental pollution poses to children’s health,” should “regulate and monitor the environmental impact of business activities that may compromise children’s right to health, food security and access to safe drinking water and to sanitation,” and should “put children’s health concerns at the centre of their climate change adaptation and mitigation strategies” (paras. 49, 50). The Committee has emphasized elsewhere as well the importance of regulation of business in order to protect children’s rights, including from the effects of environmental harm (e.g. general comment No. 16 (2013), para. 31).

60. In its general comment No. 9 (2006) on the rights of children with disabilities, the Committee stated that “countries should establish and implement policies to prevent dumping of hazardous materials and other means of polluting the environment. Furthermore, strict guidelines and safeguards should also be established to prevent radiation accidents” (para. 54). The Committee has also urged States to collect and submit information on the possible effects of environmental pollution on children’s health, and to address particular environmental problems, in its concluding observations on country reports.⁴² Finally, the Convention states that the States Parties agree that the

⁴² The Committee has also based such recommendations on other rights under the Convention on the Rights of the Child, including the rights to an adequate standard of living (art. 27) and to rest, leisure and play (art. 31). See CRC report, sect. III.

education of the child shall be directed, inter alia, to “the development of respect for the natural environment” (art. 29, para. 1(e)).

4. *Indigenous peoples*

61. Because of their close relationship with the environment, indigenous peoples are particularly vulnerable to impairment of their rights through environmental harm. As the Special Rapporteur on the rights of indigenous peoples has stated, “the implementation of natural resource extraction and other development projects on or near indigenous territories has become one of the foremost concerns of indigenous peoples worldwide, and possibly also the most pervasive source of the challenges to the full exercise of their rights” (A/HRC/18/35, para. 57).

62. International Labour Organization convention 169 and the United Nations Declaration on the Rights of Indigenous Peoples are designed to protect the rights of indigenous peoples, but human rights bodies have also interpreted other human rights agreements to protect those rights. The interpretations have reached generally congruent conclusions about the obligations of States to protect against environmental harm to the rights of indigenous peoples. In his reports, the Special Rapporteur on the rights of indigenous peoples has described in detail the duties of States to protect those rights.⁴³ This section therefore only outlines certain main points.⁴⁴

63. Firstly, States have a duty to recognize the rights of indigenous peoples with respect to the territory that they have traditionally occupied, including the natural resources on which they rely. Secondly, States are obliged to facilitate the participation of indigenous peoples in decisions that concern them. The Special Rapporteur has stated that the general rule is that “extractive activities should not take place within the territories of indigenous peoples without their free, prior and informed consent,” subject only to narrowly defined exceptions (A/HRC/24/41, para. 27). Thirdly, before development activities on indigenous lands are allowed to proceed, States must provide for an assessment of the activities’ environmental impacts. Fourthly, States must guarantee that the indigenous community affected receives a reasonable benefit from any such development. Finally, States must provide access to remedies, including compensation, for harm caused by the activities.

V. **Conclusions and recommendations**

64. Human rights law includes obligations relating to the environment. Those obligations include procedural obligations of States to assess environmental impacts on human rights and to make environmental information public, to facilitate participation in environmental decision-making, and to provide access to remedies. The obligation to facilitate public participation includes obligations to safeguard the rights of freedom of expression and association against threats, harassment and violence.

65. The human rights obligations relating to the environment also include substantive obligations to adopt legal and institutional frameworks that protect against environmental

⁴³ See Report on indigenous peoples.

⁴⁴ In addition to the reports of the Special Rapporteur, this summary draws on the ICESCR report, sect. III.C; ICCPR report, sect. III.A; ICERD report, sect. III.B; and Inter-American report, sect. III.C.

harm that interferes with the enjoyment of human rights, including harm caused by private actors. The obligation to protect human rights from environmental harm does not require States to prohibit all activities that may cause any environmental degradation; States have discretion to strike a balance between environmental protection and other legitimate societal interests. But the balance cannot be unreasonable, or result in unjustified, foreseeable infringements of human rights. In assessing whether a balance is reasonable, national and international health standards may be particularly relevant. In addition, there is a strong presumption against retrogressive measures.

66. In addition to a general requirement of non-discrimination in the application of environmental laws, States may have additional obligations to members of groups particularly vulnerable to environmental harm. Such obligations have been developed in some detail with respect to women, children and indigenous peoples, but work remains to be done to clarify the obligations pertaining to other groups.

67. Other issues deserve greater attention as well. Although it is clear that States have an obligation of international cooperation, which is of obvious relevance to global environmental problems such as climate change, clarification of the content of extraterritorial human rights obligations pertaining to the environment is still needed.

68. In other areas, the obligations are clear but there are failures to meet them. In particular, the Independent Expert is troubled by the many reports of failures to protect environmental human rights defenders. He intends to examine good practices in this area in the hope of identifying exemplary models of effective protection.

69. Human rights obligations relating to the environment are continuing to be developed in many forums, and the Independent Expert urges States to support their further development and clarification. But the obligations are already clear enough to provide guidance to States and all those interested in promoting and protecting human rights and environmental protection. His main recommendation, therefore, is that States and others take these human rights obligations into account in the development and implementation of their environmental policies.



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Promoción y protección de todos los derechos humanos, civiles, políticos, económicos, sociales y culturales, incluido el derecho al desarrollo

Informe del Experto independiente sobre la cuestión de las obligaciones de derechos humanos relacionadas con el disfrute de un medio ambiente sin riesgos, limpio, saludable y sostenible, John H. Knox

Informe de recopilación

Resumen

El presente informe del Experto independiente sobre la cuestión de las obligaciones de derechos humanos relacionadas con el disfrute de un medio ambiente sin riesgos, limpio, saludable y sostenible se somete al Consejo de Derechos Humanos de conformidad con la resolución 19/10 del Consejo.

En el informe se determinan las obligaciones de derechos humanos relacionadas con el medio ambiente, sobre la base de un amplio análisis de fuentes mundiales y regionales. El Experto independiente describe las obligaciones de procedimiento de los Estados, consistentes en evaluar el impacto ambiental en los derechos humanos, publicar información relativa al medio ambiente, facilitar la participación en la toma de decisiones ambientales y dar acceso a reparaciones cuando se produzcan daños al medio ambiente. También describe las obligaciones sustantivas de los Estados de aprobar marcos jurídicos e institucionales que protejan contra los daños ambientales que interfieran en el disfrute de los derechos humanos, incluidos los daños ocasionados por actores privados. Por último, el Experto independiente describe brevemente las obligaciones relacionadas con la protección de los miembros de grupos en situaciones vulnerables, como las mujeres, los niños y los pueblos indígenas.

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I. Introducción

1. En su resolución 19/10, el Consejo de Derechos Humanos decidió nombrar a un Experto independiente sobre la cuestión de las obligaciones de derechos humanos relacionadas con el disfrute de un medio ambiente sin riesgos, limpio, saludable y sostenible. En marzo de 2013, el Experto independiente presentó al Consejo un informe preliminar en el que describía la evolución de la relación entre los derechos humanos y el medio ambiente (A/HRC/22/43). En el informe se explicaba que el principal objetivo del Experto independiente en el segundo año de su mandato sería determinar las obligaciones de derechos humanos relacionadas con el disfrute de un medio ambiente sin riesgos, limpio, saludable y sostenible.

2. Con ese fin, el Experto independiente llevó a cabo amplias investigaciones y celebró cuatro consultas regionales, en Nairobi, Ginebra, Ciudad de Panamá y Copenhague (la consulta de Copenhague fue con personas de países de Asia y Europa). Las consultas le permitieron escuchar las opiniones de los interesados, entre ellos los gobiernos, los órganos internacionales, las instituciones nacionales de derechos humanos, las organizaciones de la sociedad civil, el sector privado y las instituciones académicas. En cada una de las consultas se abordó un tema concreto: los derechos y deberes de procedimiento, los derechos y deberes sustantivos, los miembros de grupos en situaciones vulnerables y la integración de las cuestiones relativas a los derechos humanos y el medio ambiente en las instituciones internacionales.

3. En la sección II del presente documento se describe en más detalle el proceso de recopilación. En la sección III se señalan los derechos humanos amenazados por los daños ambientales, y en la sección IV se describen las obligaciones de derechos humanos que se relacionan con el medio ambiente.

4. El Experto independiente también abordó los demás aspectos del mandato en 2013. Colaboró con el Programa de las Naciones Unidas para el Medio Ambiente y con la Oficina del Alto Comisionado de las Naciones Unidas para los Derechos Humanos (ACNUDH) en el desarrollo de un programa interinstitucional para encontrar y difundir información sobre buenas prácticas en el cumplimiento de las obligaciones de derechos humanos relativas a la protección del medio ambiente⁴⁵. En las cuatro consultas regionales celebradas se debatieron tanto las buenas prácticas como las obligaciones. En una visita a Costa Rica realizada en septiembre de 2013 también se identificaron buenas prácticas, que se describen en un informe aparte sobre dicha visita. Para 2014 están planificadas otras consultas sobre buenas prácticas, en Sudáfrica, Tailandia y los Estados Unidos de América⁴⁶. También se identificarán buenas prácticas mediante otros métodos, como el envío de cuestionarios a los interesados. El objetivo es preparar un compendio de buenas prácticas para marzo de 2015.

5. El Experto independiente ha aportado una perspectiva de derechos humanos a los procesos de seguimiento de la Conferencia de las Naciones Unidas sobre el Desarrollo Sostenible de 2012 y ha formulado

⁴⁵ En el programa interinstitucional se prefiere el término "buenas prácticas" a "prácticas óptimas" porque se entiende que, en muchas situaciones, no se podrá establecer un único enfoque "óptimo". Para que una práctica se considere "buena" debe integrar los derechos humanos y las normas ambientales de manera ejemplar.

⁴⁶ La consulta de los Estados Unidos de América se celebrará en la Universidad de Yale, junto con el Instituto de las Naciones Unidas para Formación Profesional e Investigaciones.

recomendaciones para la consecución de los Objetivos de Desarrollo del Milenio, mediante su participación en la consulta temática mundial sobre la sostenibilidad ambiental después de 2015 y en un acto paralelo sobre derechos humanos y medio ambiente celebrado el 12 de diciembre de 2013, durante el sexto período de sesiones del Grupo de Trabajo de Composición Abierta sobre los Objetivos de Desarrollo Sostenible. El Experto independiente ha recomendado que los Objetivos de Desarrollo Sostenible integren un enfoque de la protección del medio ambiente que se base en los derechos humanos.

6. El Experto independiente también ha apoyado los esfuerzos de otros por integrar los derechos humanos y las consideraciones relativas al medio ambiente. Participó en el seminario Asia-Europa de derechos humanos y medio ambiente, intervino ante la International Bar Association y se reunió con su grupo de trabajo sobre derechos humanos y cambio climático, e intervino también en una reunión de países de América Latina y el Caribe en que se estaba considerando un acuerdo regional sobre la aplicación del principio 10 de la Declaración de Río sobre el Medio Ambiente y el Desarrollo. El Experto independiente ha colaborado asimismo con el Centro de Derechos Humanos de Harvard en su desarrollo de una "plataforma de conocimientos" para describir casos en que se han invocado los derechos humanos en relación con cuestiones medioambientales, y con el Universal Rights Group en la elaboración de un programa de reuniones e informes en que se destaquen los problemas a que se enfrentan los defensores de los derechos humanos que trabajan en la esfera del medio ambiente.

II. Determinación de las obligaciones de derechos humanos relacionadas con el medio ambiente

7. Para atender a la solicitud formulada por el Consejo de Derechos Humanos en su resolución 19/10 en el sentido de que el Experto independiente "estudiara las obligaciones de derechos humanos, entre ellas las relativas a la no discriminación, que tengan que ver con el disfrute de un medio ambiente sin riesgos, limpio, saludable y sostenible", el Experto independiente examinó un amplio abanico de fuentes de derecho de los derechos humanos. Algunas de estas fuentes ya habían sido examinadas por especialistas, pero no todas. Aun reconociendo la importancia de esa labor anterior de otros especialistas, el Experto independiente realizó un nuevo examen del material principal. Para que ese estudio fuera lo más exhaustivo posible, solicitó y obtuvo una considerable asistencia gratuita de académicos y bufetes internacionales de abogados. Con su ayuda, se examinaron miles de páginas de material, incluidos textos de acuerdos, declaraciones y resoluciones; declaraciones de Estados y organizaciones internacionales; e interpretaciones de tribunales y órganos de tratados.

8. Las declaraciones pertinentes se describen en 14 informes, cada uno de ellos dedicado a una fuente o un conjunto de fuentes en particular. Antes de ser ultimados, los informes se editaron para incorporar los resultados de las consultas regionales, y fueron revisados por expertos externos. Los informes pueden consultarse tanto en el sitio web del ACNUDH⁴⁷ como en el sitio web del Experto independiente⁴⁸.

⁴⁷

<http://www.ohchr.org/EN/Issues/Environment/IEEnvironment/Pages/IEEnvironmentIndex.as>

⁴⁸ <http://ieenvironment.org>.

9. Los informes pueden clasificarse en cuatro categorías principales: a) mecanismos y órganos de tratados de derechos humanos de las Naciones Unidas; b) tratados mundiales de derechos humanos; c) sistemas regionales de derechos humanos, y d) instrumentos internacionales relativos al medio ambiente.

10. En la categoría de los mecanismos y órganos de tratados de derechos humanos de las Naciones Unidas, se elaboraron tres informes. En el primero se examinan las declaraciones formuladas por los Estados mediante resoluciones del Consejo de Derechos Humanos y la Asamblea General y mediante el proceso del examen periódico universal⁴⁹. En el segundo se examinan las declaraciones e informes de 11 procedimientos especiales del Consejo de Derechos Humanos cuyos mandatos guardan particular relación con el nexo entre los derechos humanos y el medio ambiente⁵⁰, a saber:

El Relator Especial sobre una vivienda adecuada como elemento integrante del derecho a un nivel de vida adecuado y sobre el derecho de no discriminación a este respecto;

El Relator Especial sobre el derecho a la educación;

El Relator Especial sobre la extrema pobreza y los derechos humanos;

El Relator Especial sobre el derecho a la alimentación;

El Relator Especial sobre el derecho de toda persona al disfrute del más alto nivel posible de salud física y mental;

El Relator Especial sobre la situación de los defensores de los derechos humanos;

El Relator Especial sobre los derechos humanos de los desplazados internos;

El Experto independiente sobre cuestiones de las minorías;

El Relator Especial sobre las implicaciones para los derechos humanos de la gestión y eliminación ecológicamente racionales de las sustancias y los desechos peligrosos;

El Representante Especial del Secretario General para la cuestión de los derechos humanos y las empresas transnacionales y otras empresas, y el Grupo de Trabajo sobre esta cuestión; y

El Relator Especial sobre el derecho humano al agua potable y el saneamiento.

11. En el tercer informe de esta categoría se examina la labor del Relator Especial sobre los derechos de los pueblos indígenas, incluida su aplicación de los dos instrumentos internacionales más importantes sobre los derechos de estos pueblos: la Declaración de las Naciones Unidas sobre los derechos de los pueblos indígenas y el Convenio N° 169 de la Organización Internacional del Trabajo, de 1989, sobre pueblos indígenas y tribales⁵¹.

⁴⁹ Informe individual sobre la Asamblea General y el Consejo de Derechos Humanos, incluido el proceso del examen periódico universal.

⁵⁰ Informe individual sobre los procedimientos especiales del Consejo de Derechos Humanos (informe sobre los procedimientos especiales).

⁵¹ Informe individual sobre los derechos de los pueblos indígenas (informe sobre los pueblos indígenas).

12. La segunda categoría de fuentes comprende los tratados mundiales de derechos humanos. En los cinco informes de esta categoría se examinan el Pacto Internacional de Derechos Económicos, Sociales y Culturales, el Pacto Internacional de Derechos Civiles y Políticos, la Convención Internacional sobre la Eliminación de todas las Formas de Discriminación Racial, la Convención sobre la eliminación de todas las formas de discriminación contra la mujer y la Convención sobre los Derechos del Niño⁵². Además del texto de los acuerdos, en los informes se examinan también las interpretaciones pertinentes formuladas por los órganos de tratados en sus observaciones generales, los informes de los países y los dictámenes sobre las comunicaciones presentadas.

13. La tercera categoría de fuentes –los sistemas regionales de derechos humanos– comprende tres informes. En uno de ellos se examina la jurisprudencia del Tribunal Europeo de Derechos Humanos respecto de la aplicación del Convenio Europeo para la Protección de los Derechos Humanos y de las Libertades Fundamentales a las cuestiones medioambientales⁵³. En otro se describen las decisiones de la Comisión Interamericana de Derechos Humanos y la Corte Interamericana de Derechos Humanos que revisten interés para la interpretación de la Declaración Americana de los Derechos y Deberes del Hombre y la Convención Americana sobre Derechos Humanos⁵⁴. El tercer informe comprende los demás sistemas regionales importantes de derechos humanos, y se basa en la Carta Africana de Derechos Humanos y de los Pueblos, la Carta Árabe de Derechos Humanos, la Declaración sobre Derechos Humanos de la ASEAN y la Carta Social Europea⁵⁵.

14. La cuarta categoría abarca los instrumentos internacionales relativos al medio ambiente e incluye un informe acerca de los acuerdos regionales y mundiales sobre el medio ambiente, un informe acerca de las declaraciones no vinculantes sobre el medio ambiente y un informe acerca de la Convención sobre el acceso a la información, la participación del público en la toma de decisiones y el acceso a la justicia en asuntos ambientales (Convención de Aarhus). En estos instrumentos se establecen deberes respecto de las personas que, en ocasiones, se corresponden con obligaciones en materia de derechos humanos y revelan prácticas coherentes con ellas.

15. Los 14 informes individuales siguen un mismo formato. Tras una introducción en que se describe el objeto del informe, se exponen los derechos humanos que están amenazados por daños ambientales y las obligaciones de derechos humanos señaladas por la fuente en relación con

⁵² El nombre de cada informe se abrevia en función del tratado examinado: por ejemplo, el informe relativo al Pacto Internacional de Derechos Económicos, Sociales y Culturales se abrevia como "informe ICESCR". También se examinaron la Convención Internacional sobre la protección de los derechos de todos los trabajadores migratorios y de sus familiares y la Convención sobre los derechos de las personas con discapacidad, pero el examen no generó suficiente información pertinente como para justificar la elaboración de un informe aparte para cada una.

⁵³ Informe acerca de las perspectivas europeas sobre la cuestión de las obligaciones de derechos humanos relacionadas con el disfrute de un medio ambiente sin riesgos, limpio, saludable y sostenible (informe europeo), elaborado por investigadores del Global Studies Institute de la Universidad de Ginebra. Otra fuente importante de información es el *Manual sobre derechos humanos y medio ambiente*, segunda edición (2012), publicado por el Consejo de Europa.

⁵⁴ Informe individual sobre los acuerdos interamericanos de derechos humanos (informe interamericano).

⁵⁵ Informe individual sobre la Carta Africana, la Carta Árabe, la Declaración sobre Derechos Humanos de la ASEAN y la Carta Social Europea (informe sobre los acuerdos regionales).

la protección ambiental. Las obligaciones están organizadas en tres secciones: obligaciones de procedimiento, obligaciones sustantivas y obligaciones respecto de miembros de grupos en situaciones vulnerables. Por último, se examinan cuestiones transversales, como los daños ambientales transfronterizos y el papel de los actores no estatales.

16. En las secciones siguientes se resumen las conclusiones de los informes subsidiarios. En la sección III se describen los derechos humanos amenazados por daños ambientales y en la sección IV se exponen las obligaciones de derechos humanos relativas a la protección del medio ambiente identificadas a partir de las fuentes examinadas.

III. Derechos humanos amenazados por daños ambientales

17. En su primer informe, el Experto independiente afirmó que un aspecto "establecido de manera firme" de la relación entre los derechos humanos y el medio ambiente era que "la degradación del medio ambiente puede afectar y afecta negativamente al disfrute de muy diversos derechos humanos" (A/HRC/22/43, párr. 34). Como ha declarado el propio Consejo de Derechos Humanos, "los daños ambientales pueden tener consecuencias negativas, tanto directas como indirectas, en el disfrute efectivo de los derechos humanos" (resolución 16/11). El proyecto de recopilación aporta un decidido apoyo a esta afirmación. Prácticamente todas las fuentes examinadas indican derechos cuyo disfrute se ve menoscabado o amenazado por daños ambientales.

18. Por ejemplo, en el proceso del examen periódico universal, 45 Estados debatieron el derecho a un medio ambiente saludable reconocido en sus Constituciones, y varios identificaron amenazas al disfrute de este derecho, entre ellas el cambio climático, la desertificación y algunas actividades mineras⁵⁶. Tribunales africanos han afirmado también que la explotación petrolera a gran escala vulnera el derecho a un entorno general satisfactorio consagrado en la Carta Africana⁵⁷.

19. El Comité de Derechos Humanos ha pedido a los Estados que describan las medidas adoptadas para proteger el derecho a la vida contra el riesgo de desastres nucleares y otra contaminación del medio ambiente⁵⁸. Este derecho, al igual que otros, puede verse afectado tanto por causas naturales como por actividades humanas. El Tribunal Europeo de Derechos Humanos ha emitido fallos sobre vulneraciones del derecho a la vida ocasionadas por desastres naturales y también por el inadecuado mantenimiento de un vertedero municipal que provocó una explosión masiva⁵⁹.

20. Muchas fuentes, entre ellas el Consejo de Derechos Humanos, el Comité de Derechos Económicos, Sociales y Culturales, los relatores especiales, la Comisión Africana y el Comité Europeo de Derechos Sociales, han señalado

⁵⁶ Informe individual sobre la Asamblea General y el Consejo de Derechos Humanos, incluido el proceso del examen periódico universal, secc. III.A.

⁵⁷ Comunicación Nº 155/96, *Centro de Acción para los Derechos Sociales y Económicos c. Nigeria (caso Ogoniland)*; *SERAP v. Nigeria*, Corte de Justicia de la Comunidad Económica de los Estados de África Occidental, sentencia Nº ECW/CCJ/JUD/18/12 (14 de diciembre de 2012).

⁵⁸ Informe sobre el Pacto Internacional de Derechos Civiles y Políticos (informe ICCPR), secc. II.

⁵⁹ Informe europeo, págs. 4 y 5; y Consejo de Europa, *Manual*, págs. 35 a 37.

amenazas ambientales al derecho al disfrute del más alto nivel posible de salud física y mental. Algunos ejemplos son la eliminación inadecuada de desechos tóxicos (resolución 9/1 del Consejo de Derechos Humanos; E/CN.4/2004/46, párr. 79), la exposición a radiaciones y sustancias químicas nocivas (Comité de Derechos Económicos, Sociales y Culturales, Observación general N° 14 (2000), párr. 15), la contaminación por hidrocarburos (Comisión Africana, caso de las comunidades ogoni (caso *Ogoniland*), párr. 54) y la contaminación a gran escala del agua⁶⁰.

21. Asimismo, muchas fuentes han identificado amenazas ambientales al derecho a un nivel de vida adecuado y sus componentes. Por ejemplo, el Comité de Derechos Económicos, Sociales y Culturales ha señalado la indebida utilización de plaguicidas como una amenaza al derecho a la alimentación⁶¹, y el Relator Especial sobre el derecho a la alimentación considera que este derecho se ve amenazado por la contaminación y la pérdida de hábitats (A/67/268, párrs. 17 a 19). El Relator Especial sobre las sustancias y los desechos peligrosos ha señalado que los desechos de las industrias extractivas pueden vulnerar el derecho al agua (A/HRC/21/48, párr. 39), y la Relatora Especial sobre una vivienda adecuada como elemento integrante del derecho a un nivel de vida adecuado y sobre el derecho de no discriminación a este respecto ha descrito la amenaza que el cambio climático representa para este derecho (A/64/255).

22. De hecho, los relatores especiales han explicado cómo el cambio climático pone en peligro a un amplio abanico de derechos, entre ellos el derecho a la salud, al agua y a la alimentación⁶². Un informe del ACNUDH describe las consecuencias del cambio climático para estos y otros derechos, como el derecho a la libre determinación de los habitantes de los pequeños Estados insulares (A/HRC/10/61). El Consejo de Derechos Humanos tomó nota del informe y expresó su preocupación por el hecho de que "el cambio climático plantea una amenaza inmediata y de gran alcance para la población y las comunidades de todo el mundo y tiene consecuencias adversas en el pleno disfrute de los derechos humanos" (resolución 18/22).

23. El Consejo de Derechos Humanos ha reconocido que "los efectos del cambio climático se dejarán sentir con más fuerza en los sectores de la población que ya se encuentran en situaciones vulnerables" (resolución 16/11). Las fuentes examinadas dan ejemplos de daños ambientales que afectan particularmente a estos grupos. Por ejemplo, el Comité para la Eliminación de la Discriminación contra la Mujer ha señalado muchos tipos de daños ambientales, como los desastres naturales, el cambio climático, la contaminación nuclear y la contaminación del agua, que pueden incidir negativamente en los derechos consagrados en la Convención sobre la eliminación de todas las formas de discriminación contra la mujer⁶³. El Relator Especial sobre las sustancias y los desechos peligrosos ha destacado los peligros concretos que la exposición al mercurio en la

⁶⁰ Comité Europeo de Derechos Sociales, demanda N° 72/2011, *International Federation for Human Rights (FIDH) v. Greece* (2013).

⁶¹ Informe ICESCR, secc. II.

⁶² Informe sobre los procedimientos especiales, secc. II. Véase también la declaración conjunta de los titulares de mandatos de procedimientos especiales respecto de la Conferencia de las Naciones Unidas sobre el Cambio Climático, que puede consultarse en: <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=9667&LangID=E>.

⁶³ Informe acerca de la Convención sobre la eliminación de todas las formas de discriminación contra la mujer (informe CEDAW), secc. II.

minería artesanal representa para el derecho a la salud de las mujeres (A/HRC/21/48, párrs. 32 y 33).

24. También los derechos del niño pueden verse particularmente afectados por la degradación del medio ambiente. En la Convención sobre los Derechos del Niño se afirma que la contaminación del medio ambiente entraña "riesgos y peligros" para el suministro de alimentos nutritivos y agua potable salubre (art. 24, párr. 2 c)). En sus observaciones finales sobre los informes de los países, el Comité de los Derechos del Niño examina regularmente los peligros ambientales como barreras al disfrute del derecho a la salud y otros derechos⁶⁴. El Relator Especial sobre las sustancias y los desechos peligrosos ha destacado el daño que ocasiona al derecho de los niños a la salud la exposición al mercurio y a otras sustancias peligrosas en las industrias extractivas (A/HRC/21/48, párrs. 28 a 30).

25. Por su estrecha relación con la naturaleza, los pueblos indígenas pueden ser especialmente vulnerables a la degradación del medio ambiente. El Relator Especial sobre los derechos de los pueblos indígenas ha destacado que "las actividades de las industrias extractivas producen efectos que a menudo violan los derechos de los pueblos indígenas" (A/HRC/18/35, párr. 26) y ha detallado numerosos ejemplos de dichas violaciones, por ejemplo del derecho a la vida, a la salud y a la propiedad⁶⁵.

IV. Obligaciones de derechos humanos relacionadas con el medio ambiente

26. En esta sección se exponen las obligaciones de derechos humanos relacionadas con el medio ambiente tal y como han sido descritas por los acuerdos internacionales y los órganos encargados de interpretarlos. Aunque solo en algunos de estos acuerdos se hace referencia explícita al medio ambiente, en los últimos años los órganos de derechos humanos los han aplicado cada vez más a las cuestiones ambientales, a medida que ha aumentado el conocimiento de los peligros que plantea la degradación del medio ambiente. El resultado es un número considerable de declaraciones jurídicas, que van en aumento y que conjuntamente conforman un corpus de normas de derechos humanos relacionadas con el medio ambiente.

27. El Experto independiente entiende que no todos los Estados han aceptado oficialmente todas estas normas. Mientras que algunas de las declaraciones citadas proceden de tratados o de tribunales con autoridad para emitir dictámenes que vinculen a los Estados sometidos a su jurisdicción, otras son interpretaciones de expertos que, de por sí, no son vinculantes. Dicho esto, y a pesar de la diversidad de fuentes de que proceden, las declaraciones muestran una coherencia considerable. Conjuntamente, representan una muestra clara de la convergencia de las tendencias hacia una mayor uniformidad y certeza de las obligaciones de derechos humanos relacionadas con el medio ambiente. Estas tendencias se ven respaldadas, además, por la práctica de los Estados que se refleja en el proceso del examen periódico universal y los instrumentos internacionales relativos al medio ambiente.

⁶⁴ Informe acerca de la Convención sobre los Derechos del Niño (informe CRC), secc. II.

⁶⁵ Informe sobre los pueblos indígenas, secc. II. Véanse también el informe acerca de la Convención Internacional sobre la Eliminación de todas las Formas de Discriminación Racial (informe ICERD), secc. II; y el informe interamericano, secc. III.C.

28. En este contexto, el Experto independiente alienta a los Estados a que acepten esas declaraciones como prueba de un derecho internacional emergente o ya existente. Como mínimo, estas declaraciones deberían considerarse prácticas óptimas que los Estados deberían tratar de adoptar lo antes posible.

A. Obligaciones de procedimiento

29. Uno de los resultados más llamativos del ejercicio de recopilación es el acuerdo entre las fuentes examinadas en que el derecho de los derechos humanos impone determinadas obligaciones de procedimiento a los Estados en lo que respecta a la protección del medio ambiente. Entre esas obligaciones figuran el deber de: a) evaluar el impacto ambiental y hacer pública la información relativa al medio ambiente; b) facilitar la participación pública en la toma de decisiones ambientales, entre otras cosas protegiendo los derechos de expresión y de asociación; y c) dar acceso a recursos por los daños causados. Estas obligaciones se fundamentan en los derechos civiles y políticos, pero se han aclarado y ampliado en el contexto del medio ambiente sobre la base de todos los derechos humanos que están en peligro a causa del daño ambiental.

1. Deber de evaluar el impacto ambiental y hacer pública la información

30. En la Declaración Universal de Derechos Humanos (art. 19) y el Pacto Internacional de Derechos Civiles y Políticos (art. 19) se afirma que el derecho a la libertad de expresión incluye la libertad de "buscar, recibir y difundir informaciones". El derecho a la información también resulta de vital importancia para el ejercicio de otros derechos, como el derecho a la participación. En palabras del entonces Relator Especial sobre los efectos nocivos para el goce de los derechos humanos del traslado y vertimiento ilícitos de productos y desechos tóxicos y peligrosos, "el derecho a la información y la participación no solo es un derecho en sí mismo, sino que además es esencial para el ejercicio de otros derechos, como el derecho a la vida, el derecho al disfrute del más alto nivel posible de salud y el derecho a una alimentación adecuada, entre otros" (A/HRC/7/21, pág. 2).

31. Los órganos de derechos humanos han reiterado en numerosas ocasiones que, para proteger los derechos humanos de las violaciones ocasionadas por los daños ambientales, los Estados deberían dar acceso a la información relativa al medio ambiente y prever la evaluación de los impactos ambientales que puedan interferir en el disfrute de los derechos humanos.

32. Por ejemplo, en su Observación general N° 15 (2002), sobre el derecho al agua, el Comité de Derechos Económicos, Sociales y Culturales afirmó que debía proporcionarse a los particulares un acceso pleno e igual a la información sobre el agua y el medio ambiente (párr. 48). En sus respuestas a los informes de los países, el Comité ha instado a los Estados a evaluar los efectos de las medidas que pudieran tener consecuencias ambientales adversas en el derecho a la salud y otros derechos de su ámbito de competencia⁶⁶. De manera similar, la Relatora Especial sobre la situación de los defensores de los derechos humanos ha declarado que la información relativa a los proyectos de desarrollo a gran escala debe estar disponible y accesible al público (A/68/262, párr. 62). La Relatora Especial sobre el derecho humano al agua potable y el saneamiento ha declarado, a su vez, que, cuando los Estados planifiquen proyectos que puedan tener efectos

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Informe ICESCR, secc. III.A.1.

sobre la calidad del agua, tendrán que realizar evaluaciones de los efectos "ajustándose a las normas y los principios de derechos humanos" (A/68/264, párr. 73)⁶⁷.

33. Los órganos regionales también han concluido que los Estados deben proporcionar información ambiental y prever evaluaciones del impacto ambiental en los derechos humanos. Por ejemplo, en lo que respecta al derecho al respeto de la vida privada y familiar consagrado en el Convenio Europeo de Derechos Humanos (art. 8), el Tribunal Europeo ha declarado lo siguiente:

Quando un Estado debe determinar cuestiones complejas de política ambiental y económica, el proceso de adopción de la decisión (...) debe involucrar en primer término la realización de investigaciones y estudios adecuados que permitan predecir y evaluar anticipadamente los efectos de aquellas actividades que puedan dañar el medio ambiente y vulnerar los derechos de las personas, así como lograr un justo equilibrio entre los distintos intereses contrapuestos. La importancia de que el público pueda acceder a las conclusiones de estos estudios y a información que le permita evaluar el riesgo al que está expuesto es incuestionable⁶⁸.

34. Los instrumentos internacionales ilustran la importancia de proporcionar al público información sobre el medio ambiente. El principio 10 de la Declaración de Río reza lo siguiente: "En el plano nacional, toda persona deberá tener acceso adecuado a la información sobre el medio ambiente de que dispongan las autoridades públicas, incluida la información sobre los materiales y las actividades que encierran peligro en sus comunidades (...) Los Estados deberán facilitar y fomentar la sensibilización y la participación de la población, poniendo la información a disposición de todos"⁶⁹. Muchos tratados relativos al medio ambiente, como el Convenio de Rotterdam sobre el Procedimiento de Consentimiento Fundamentado Previo Aplicable a Ciertos Plaguicidas y Productos Químicos Peligrosos Objeto de Comercio Internacional (art. 15), el Convenio de Estocolmo sobre contaminantes orgánicos persistentes (art. 10) y la Convención Marco de las Naciones Unidas sobre el Cambio Climático (art. 6 a)), exigen que se proporcione al público información ambiental. La Convención de Aarhus incluye obligaciones particularmente detalladas⁷⁰. Ilustrando el vínculo existente entre sus obligaciones y las dimanantes del derecho de los derechos humanos, muchas partes en la Convención de

⁶⁷ Pueden consultarse otras declaraciones de relatores especiales sobre el acceso a la información y la evaluación del impacto ambiental en el informe sobre los procedimientos especiales, secc. III.A.1.

⁶⁸ *Taşkin v. Turkey*, 2004-X, Tribunal Europeo de Derechos Humanos 179, párr. 119. Véanse también *Öneryıldız v. Turkey*, 2004-XII, Tribunal Europeo de Derechos Humanos 1, párr. 90 (aplicación del derecho a la información en relación con el derecho a la vida); caso *Ogoniland*, párr. 53 (derivación de obligaciones del derecho a la salud y el derecho a un medio ambiente saludable); Corte Interamericana, *Claude Reyes et al. c. Chile*, sentencia de 19 de septiembre de 2006 (se ordenó al Estado que adoptara las medidas necesarias para hacer efectivo el derecho al acceso a la información bajo el control del Estado).

⁶⁹ Véanse también las "Directrices para la elaboración de legislación nacional sobre el acceso a la información, participación pública y acceso a la justicia en materia de medio ambiente" aprobadas en el 11º período extraordinario de sesiones del Consejo de Administración/Foro Ambiental Mundial a Nivel Ministerial del Programa de las Naciones Unidas para el Medio Ambiente.

⁷⁰ Pueden consultarse otros ejemplos en el informe relativo a los acuerdos multilaterales sobre el medio ambiente, secc. III.A.1.

Aarhus han analizado su cumplimiento de este acuerdo en los informes presentados en el marco del proceso del examen periódico universal⁷¹.

35. La mayoría de los Estados han aprobado leyes de evaluación del impacto ambiental de conformidad con el principio 17 de la Declaración de Río, en que se establece que deberá "emprenderse una evaluación del impacto ambiental, en calidad de instrumento nacional, respecto de cualquier actividad propuesta que probablemente haya de producir un impacto negativo considerable en el medio ambiente y que esté sujeta a la decisión de una autoridad nacional competente". El Banco Mundial exige una evaluación ambiental de todos los proyectos financiados por el Banco, "con el fin de garantizar su solidez y sostenibilidad ambiental"⁷².

2. Deber de facilitar la participación pública en la toma de decisiones ambientales

36. Los derechos básicos de todas las personas a participar en el gobierno de su país y en la dirección de los asuntos públicos quedan reconocidos en la Declaración Universal de Derechos Humanos (art. 21) y en el Pacto Internacional de Derechos Civiles y Políticos (art. 25), respectivamente. También en este caso, los órganos de derechos humanos han trasladado esos derechos básicos al ámbito medioambiental para establecer la obligación de facilitar la participación pública en la toma de decisiones ambientales a fin de salvaguardar un amplio espectro de derechos contra los daños ambientales.

37. El Relator Especial sobre las sustancias y los desechos peligrosos y la Relatora Especial sobre la situación de los defensores de los derechos humanos han declarado que los gobiernos deben facilitar el derecho a participar en la toma de decisiones ambientales (véanse los documentos A/HRC/7/21 y A/68/262)⁷³. El Comité de Derechos Económicos, Sociales y Culturales ha alentado a los Estados a celebrar consultas con los interesados durante las evaluaciones del impacto ambiental, y ha destacado que, antes de adoptar medidas que interfieran con el derecho al agua, las autoridades competentes deberán dar la oportunidad de "una auténtica consulta con los afectados" (Observación general N° 15 (2002), párr. 56). Los tribunales regionales de derechos humanos están de acuerdo en que las personas deberían tener oportunidades reales de participar en la toma de decisiones relativas a su medio ambiente⁷⁴.

38. La necesidad de participación pública queda reflejada en numerosos instrumentos internacionales relativos al medio ambiente. En el principio 10 de la Declaración de Río se establece lo siguiente: "El mejor modo de tratar las cuestiones ambientales es con la participación de todos los ciudadanos interesados, en el nivel que corresponda (...) Toda persona deberá tener (...) la oportunidad de participar en los procesos de adopción de decisiones". En 2012, en El futuro que queremos, documento final de la Conferencia de las Naciones Unidas sobre el Desarrollo Sostenible (Conferencia Río+20), los Estados reconocieron que "las oportunidades para que las personas

⁷¹ Informe individual sobre la Asamblea General y el Consejo de Derechos Humanos, incluido el proceso del examen periódico universal, secc. III.

⁷² Política Operacional 4.01 del Banco Mundial, párr. 1. Véase también el informe N° 40746-ZR del Panel de Inspección del Banco Mundial, de 31 de agosto de 2007, párr. 346 (se llegó a la conclusión de que no llevar a cabo una evaluación ambiental contravenía la Política Operacional).

⁷³ Pueden consultarse otras declaraciones de relatores especiales en el informe sobre los procedimientos especiales, secc. III.A.2.

⁷⁴ Informe sobre los acuerdos regionales, secc. II.B.1; e informe interamericano, secc. III.A.2.

influyan en su vida y su futuro, participen en la adopción de decisiones y expresen sus inquietudes son fundamentales para el desarrollo sostenible" (A/CONF.216/16, párr. 13). Entre los tratados relativos al medio ambiente que prevén la participación pública figuran el Convenio de Estocolmo sobre contaminantes orgánicos persistentes (art. 10), el Convenio sobre la Diversidad Biológica (art. 14, párr. 1), la Convención de las Naciones Unidas de Lucha contra la Desertificación (arts. 3 y 5) y la Convención Marco de las Naciones Unidas sobre el Cambio Climático (art. 6 a)). La Convención de Aarhus contiene exigencias particularmente detalladas (arts. 6 a 8)⁷⁵.

39. Los derechos a la libertad de expresión y de asociación son particularmente importantes en lo que respecta a la participación pública en la toma de decisiones ambientales. La Relatora Especial sobre la situación de los defensores de los derechos humanos ha manifestado que los defensores que trabajan en lo referente a los derechos sobre la tierra y los recursos naturales constituyen el segundo grupo más vulnerable a perder la vida a causa de sus actividades (A/HRC/4/37) y que su situación parece haber empeorado desde 2007 (A/68/262, párr. 18). En su último informe, la Relatora describió los extraordinarios riesgos, como las amenazas, el acoso y la violencia física, a que se enfrentan los defensores de las comunidades locales cuando se oponen a la ejecución de proyectos que tienen un impacto directo sobre los recursos naturales, la tierra o el medio ambiente (A/68/262, párr. 15).

40. Los Estados están obligados no solo a abstenerse de violar el derecho a la libertad de expresión y de asociación de manera directa, sino también a proteger la vida, la libertad y la seguridad de los individuos que ejerzan esos derechos⁷⁶. No cabe ninguna duda de que estas obligaciones se aplican a todos aquellos que ejercen sus derechos respecto de cuestiones medioambientales. La Relatora Especial sobre la situación de los defensores de los derechos humanos destacó estas obligaciones en dicho contexto (A/68/262, párrs. 16 y 30), al igual que el Relator Especial sobre los derechos de los pueblos indígenas (A/HRC/24/41, párr. 21), el Comité de Derechos Económicos, Sociales y Culturales⁷⁷, la Corte Interamericana de Derechos Humanos⁷⁸ y la Comisión de Derechos Humanos, que instaron a los Estados a "tomar todas las medidas que [fueran] necesarias para proteger el ejercicio legítimo de los derechos humanos de todos al promover la protección del medio ambiente y el desarrollo sostenible" (resolución 2003/71).

3. Deber de dar acceso a recursos jurídicos

41. Desde la aprobación de la Declaración Universal de Derechos Humanos, los acuerdos de derechos humanos han establecido el principio de que los Estados deben prever "recursos efectivos" en caso de violación de los derechos que en ellos se protegen. Los órganos de derechos humanos han aplicado este principio a los derechos humanos vulnerados por daños ambientales. Por ejemplo, el Comité de Derechos Económicos, Sociales y Culturales ha instado a los Estados a prever la provisión de una

⁷⁵ Informe acerca de los acuerdos multilaterales sobre el medio ambiente, secc. III.A.2.

⁷⁶ Pacto Internacional de Derechos Civiles y Políticos, art. 2; y Declaración sobre el derecho y el deber de los individuos, los grupos y las instituciones de promover y proteger los derechos humanos y las libertades fundamentales universalmente reconocidos, arts. 2, 9 y 12.

⁷⁷ Informe ICESCR, secc. III.A.4.

⁷⁸ Por ejemplo, *Kawas Fernández v. Honduras* (Fondo, reparaciones y costas), sentencia de 3 de abril de 2009 (Serie C, N° 196). Pueden consultarse otros casos en el informe interamericano, secc. III.A.4.

"indemnización apropiada y/o viviendas y tierras alternativas para el cultivo" a las comunidades indígenas y los agricultores locales cuyas tierras se hayan visto anegadas por amplios proyectos de infraestructuras, así como una justa compensación y el reasentamiento de los pueblos indígenas desplazados por la forestación⁷⁹. La Relatora Especial sobre la situación de los defensores de los derechos humanos ha declarado que los Estados deben establecer mecanismos que permitan a los defensores comunicar sus reclamaciones, exigir responsabilidades y obtener una reparación efectiva si se producen violaciones de derechos, sin temor a intimidaciones de ningún tipo (A/68/262, párrs. 70 a 73). Otros relatores especiales, como los que se ocupan de la vivienda, la educación y las sustancias y los desechos peligrosos, han destacado también la importancia del acceso a vías de recurso en el ámbito de sus respectivos mandatos⁸⁰.

42. A nivel regional, el Tribunal Europeo ha declarado que los individuos deben poder "impugnar ante los tribunales cualquier decisión, acto u omisión respecto del cual consideren que sus opiniones o intereses no han sido sopesados suficientemente en el proceso de decisión"⁸¹. De manera más general, la Comisión Interamericana de Derechos Humanos y la Corte Interamericana de Derechos Humanos han declarado que la Convención Americana sobre Derechos Humanos exige a los Estados proporcionar acceso a recursos judiciales a quienes consideren que se han violado sus derechos como consecuencia de un daño ambiental⁸². El Tribunal de Justicia de la Comunidad Económica de los Estados de África Occidental ha destacado la necesidad de que los Estados exijan responsabilidades a quienes violen los derechos humanos mediante la contaminación por hidrocarburos, y de que garanticen una adecuada reparación a las víctimas⁸³.

43. Los instrumentos internacionales relativos al medio ambiente apoyan la obligación de garantizar recursos efectivos. El principio 10 de la Declaración de Río establece lo siguiente: "Deberá proporcionarse acceso efectivo a los procedimientos judiciales y administrativos, entre estos el resarcimiento de daños y los recursos pertinentes". Muchos tratados relativos al medio ambiente obligan a los Estados a garantizar recursos en esferas concretas. Por ejemplo, la Convención de las Naciones Unidas sobre el Derecho del Mar obliga a los Estados a asegurarse de que sus sistemas jurídicos ofrezcan recursos que permitan la pronta y adecuada indemnización u otra reparación de los daños causados por la contaminación del medio marino por personas naturales o jurídicas (art. 235). Algunos acuerdos prevén regímenes de responsabilidad detallados; como ejemplo cabe destacar el Convenio internacional sobre responsabilidad civil por daños causados por la contaminación por hidrocarburos⁸⁴.

B. Obligaciones sustantivas

44. Los Estados tienen la obligación de proteger contra los daños ambientales que interfieran en el disfrute de los derechos humanos. Como

⁷⁹ Informe ICESCR, secc. III.A.3.

⁸⁰ Informe sobre los procedimientos especiales, secc. III.A.3.

⁸¹ *Taşkin v. Turkey*, párr. 119.

⁸² Informe interamericano, secc. III.A.3.

⁸³ *SERAP v. Nigeria*, párr. 97.

⁸⁴ Véase, en general, el informe acerca de los acuerdos multilaterales sobre el medio ambiente, secc. III.A.3.

se explica en la sección II, los daños ambientales pueden amenazar un espectro amplio de derechos humanos, entre ellos el derecho a la vida y a la salud. Por tanto, el contenido de las obligaciones concretas de los Estados de proteger contra los daños ambientales depende del contenido de sus deberes respecto de los derechos específicos amenazados por esos daños.

45. Estos deberes pueden variar en función del derecho que deba protegerse. Por ejemplo, los Estados tienen la obligación general de respetar y garantizar los derechos consagrados en el Pacto Internacional de Derechos Civiles y Políticos (art. 2, párr. 1), la Convención sobre los Derechos del Niño (art. 2, párr. 1) y la Convención Americana sobre Derechos Humanos (art. 1); de adoptar medidas para hacer plenamente efectivos los derechos reconocidos en el Pacto Internacional de Derechos Económicos, Sociales y Culturales; de garantizar los derechos consagrados en el Convenio Europeo de Derechos Humanos (art. 1); y de reconocer y hacer efectivos los derechos consagrados en la Carta Africana (art. 1). Cuando los daños ambientales amenazan o vulneran un derecho consagrado en uno o varios de estos acuerdos, las obligaciones generales de los Estados respecto de dicho derecho (respetarlo y garantizarlo, o adoptar medidas para hacerlo plenamente efectivo) se aplicarán respecto de esa vulneración o amenaza ambiental.

46. A pesar de las diferencias en la forma de expresar estas obligaciones de carácter general, sin embargo, las interpretaciones han sido notablemente parecidas al hacer referencia a cuestiones ambientales. Aunque los límites de las obligaciones ambientales específicas siguen evolucionando, algunas de sus características principales ya están claras. Concretamente, los Estados están obligados a: a) adoptar y aplicar marcos jurídicos para proteger contra daños ambientales que puedan vulnerar los derechos humanos, y b) regular a los agentes privados para proteger contra esos daños.

1. Obligación de adoptar y aplicar un marco jurídico

47. Los Estados tienen la obligación de adoptar y aplicar marcos jurídicos e institucionales para proteger contra los daños ambientales que interfieran o puedan interferir en el disfrute de los derechos humanos, y para responder a ellos. Estas obligaciones emanan de una serie de derechos humanos como el derecho a la vida y a la salud.

48. El Comité de Derechos Humanos sostiene desde hace tiempo que el derecho a la vida consagrado en el Pacto Internacional de Derechos Civiles y Políticos "no puede entenderse de manera restrictiva y la protección de este derecho exige que los Estados adopten medidas positivas" (Observación general Nº 6 (1982), sobre el derecho a la vida, párr. 5). Aunque el Comité no ha descrito en detalle las medidas necesarias para proteger el derecho a la vida contra los daños ambientales, sí lo han hecho otros órganos de derechos humanos. En particular, el Tribunal Europeo ha sostenido que los Estados tienen la obligación primordial de establecer un marco legislativo y administrativo que proteja contra las vulneraciones del derecho a la vida derivadas de desastres naturales y actividades peligrosas, como las de las fábricas de productos químicos y los vertederos, y responda a ellas⁸⁵. La Comisión Interamericana de Derechos Humanos

⁸⁵ Consejo de Europa, *Manual*, págs. 18 y 36 a 40. Véanse, por ejemplo, *Öneriyildiz v. Turkey*, Nº 48939/99, 30 de noviembre de 2004; y *Budayeva and others v. Russia*, Nº 15339/02, 20 de marzo de 2008. El Tribunal Europeo también ha derivado esta obligación del derecho a la vida privada y a la vida familiar; véase *Tatar v. Romania*, Nº 67021/01, 6 de julio de 2009, párr. 88.

también ha instado a los Estados a adoptar medidas para proteger el medio ambiente y cumplir así con sus obligaciones de proteger los derechos, entre ellos el derecho a la vida y a la salud⁸⁶.

49. En cuanto al derecho a la salud, en el Pacto Internacional de Derechos Económicos, Sociales y Culturales (art. 12, párr. 2 b)) se establece que, entre las medidas que deberán adoptar los Estados para asegurar la plena efectividad de este derecho, figurarán "las necesarias para (...) (e)l mejoramiento en todos sus aspectos de la higiene del trabajo y del medio ambiente". Interpretando este texto en su Observación general N° 14 (2000), el Comité de Derechos Económicos, Sociales y Culturales afirmó que "el derecho a la salud abarca una amplia gama de factores socioeconómicos que promueven las condiciones merced a las cuales las personas pueden llevar una vida sana, y hace ese derecho extensivo a los factores determinantes básicos de la salud, como (...) un medio ambiente sano" (párr. 4). El Comité ha interpretado que la frase "(e)l mejoramiento en todos sus aspectos de la higiene del trabajo y del medio ambiente" del artículo 12, párrafo 2 b), incluye "la prevención y reducción de la exposición de la población a sustancias nocivas tales como radiaciones y sustancias químicas nocivas u otros factores ambientales perjudiciales que afectan directa o indirectamente a la salud de los seres humanos" (párr. 15). Con tal fin, se pide a los Estados que adopten medidas para combatir los riesgos para la salud relacionados con el medio ambiente, entre otras cosas formulando y aplicando políticas "con miras a reducir y suprimir la contaminación del aire, el agua y el suelo" (párr. 36). En caso de daños ambientales que vulneren los derechos humanos, los Estados están obligados a responder prestando asistencia a las víctimas, también cuando estos daños son consecuencia de desastres naturales⁸⁷.

50. Los relatores especiales también han hecho referencia a las obligaciones de los Estados respecto de los daños ambientales que violan los derechos humanos⁸⁸. La Relatora Especial sobre el derecho humano al agua potable y el saneamiento, por ejemplo, afirmó lo siguiente (A/68/264, párr. 48):

Para frenar eficazmente la contaminación del agua, deben aplicarse reglamentos en todos los sectores y todo el país, dando prioridad a la eliminación de los problemas más urgentes y graves, que varían de un país a otro y dentro de ellos. Esos problemas pueden derivarse de la utilización de plaguicidas y fertilizantes en la agricultura en las zonas rurales, el hecho de que no se confinen ni traten los lodos residuales y residuos sépticos en zonas urbanas densamente pobladas, o la descarga de aguas residuales industriales en zonas que experimentan un crecimiento económico repentino. Los Estados han de evaluar la situación a nivel microeconómico y priorizar la solución de los problemas más urgentes.

51. El Relator Especial sobre las sustancias y los desechos peligrosos ha publicado una serie de informes en los que se señalan las obligaciones de los Estados respecto de estas sustancias. Por ejemplo, en un informe de 2006 sobre el impacto en los derechos humanos de la exposición generalizada de los individuos y las comunidades a sustancias químicas tóxicas presentes en productos de uso doméstico diario y alimentos (E/CN.4/2006/42, párr. 45), el Relator afirmó lo siguiente:

⁸⁶ Véase el informe interamericano, secc. III.B.

⁸⁷ Véase, en general, el informe ICESCR, secc. III.B.

⁸⁸ Véase, en general, el informe sobre los procedimientos especiales, secc. III.B.

(...) los deberes de los Estados en este sentido se traducen en la obligación de tomar las disposiciones necesarias para reglamentar con precaución la producción, el almacenamiento y el uso de productos químicos peligrosos a fin de evitar que la exposición a ese tipo de sustancias alcance un nivel que dé lugar a violaciones de los derechos humanos. Los Estados también deben proporcionar recursos efectivos y una reparación a las víctimas de violaciones resultantes de la exposición a productos químicos peligrosos. Dicho de otro modo, los Estados deben reglamentar la producción y el uso de los productos químicos de manera compatible con todo el abanico de obligaciones que han asumido de conformidad con la normativa internacional de derechos humanos.

52. Los Estados han reconocido la importancia de incorporar las consideraciones de derechos humanos a la legislación relativa al medio ambiente. El Consejo de Derechos Humanos ha declarado que "las obligaciones y los compromisos en materia de derechos humanos pueden guiar y reforzar la formulación de políticas internacionales, regionales y nacionales en la esfera de la protección ambiental" y ha instado a los Estados "a tomar en consideración los derechos humanos al elaborar sus políticas ambientales" (resolución 16/11). El Consejo y las Partes en la Convención Marco de las Naciones Unidas sobre el Cambio Climático han declarado que los Estados, en todas las actividades relacionadas con el cambio climático, deberían respetar plenamente los derechos humanos (resolución 18/22 y FCCC/CP/2010/7/Add.1, decisión 1/CP.16). En el proceso del examen periódico universal, muchos Estados han descrito las medidas adoptadas para crear instituciones y aprobar leyes y políticas destinadas a asegurar la protección ambiental⁸⁹.

53. La obligación de proteger los derechos humanos contra los daños ambientales no exige el cese de todas las actividades que puedan provocar una degradación del medio ambiente. La Comisión Africana, por ejemplo, ha dejado claro que la Carta Africana no exige a los Estados renunciar a todas las explotaciones petroleras⁹⁰. El Tribunal Europeo ha declarado que los Estados pueden optar por lograr un equilibrio entre la protección del medio ambiente y otras cuestiones importantes para la sociedad, como el desarrollo económico y los derechos de otros⁹¹. Sin embargo, este equilibrio debe ser razonable y no conducir a violaciones previsibles e injustificadas de los derechos humanos. En el caso *Ogoniland*, la Comisión Africana citó los enormes daños ambientales que habían afectado a los derechos de los habitantes de la región del delta del Níger al dictaminar que no se había tenido el cuidado que se debía haber tenido, entre otras cosas adoptando medidas razonables, para prevenir la contaminación y la degradación ecológica por la producción de petróleo⁹². Asimismo, el Tribunal Europeo ha dictado sentencias en que ha declarado que los Estados no lograron establecer un equilibrio justo entre la protección de los derechos contra los daños ambientales y la protección de otros intereses⁹³.

⁸⁹ Informe individual sobre la Asamblea General y el Consejo de Derechos Humanos, incluido el proceso del examen periódico universal, secc. IV.B.1.

⁹⁰ Caso *Ogoniland*, párr. 54.

⁹¹ Consejo de Europa, *Manual*, pág. 20. Véase, por ejemplo, *Hatton and others v. United Kingdom*, Nº 360022/97, 8 de julio de 2003, párr. 98.

⁹² Caso *Ogoniland*, párr. 54.

⁹³ Véanse, por ejemplo, *López Ostra v. Spain*, Nº 16798/90, 9 de diciembre de 1994; y *Tatar v. Romania*, Nº 67021/01, 27 de enero de 2009.

54. En este sentido pueden resultar especialmente pertinentes las normas nacionales e internacionales en materia de salud. Por ejemplo, para determinar si un Estado había incumplido sus obligaciones dimanantes de la Carta Social Europea en cuanto al derecho a la salud, el Comité Europeo de Derechos Sociales evaluó el riesgo que suponía la contaminación del agua a la luz de las normas sobre la inocuidad del agua fijadas por la Organización Mundial de la Salud (OMS) y otros órganos públicos⁹⁴. El Tribunal Europeo también ha tenido en cuenta las normas nacionales y de la OMS en materia de salud e inocuidad para decidir si los Estados habían logrado establecer un justo equilibrio entre la protección ambiental y otros intereses⁹⁵.

55. Otro factor pertinente para determinar si una ley medioambiental se ajusta a las obligaciones de derechos humanos es ver si es regresiva. El Comité de Derechos Económicos, Sociales y Culturales ha desaconsejado enérgicamente las medidas regresivas respecto del disfrute de los derechos protegidos por el Pacto Internacional, a la luz de la obligación recogida en el Pacto de avanzar lo más rápidamente posible hacia la plena efectividad de los derechos. En su Observación general sobre el derecho al disfrute del más alto nivel posible de salud, el Comité señaló que "(a)l igual que en el caso de los demás derechos enunciados en el Pacto, existe una fuerte presunción de que no son permisibles las medidas regresivas adoptadas en relación con el derecho a la salud". Si se adoptan cualesquiera medidas deliberadamente regresivas, corresponde al Estado demostrar que se han aplicado tras un examen exhaustivo de todas las alternativas posibles y que esas medidas "están debidamente justificadas por referencia a la totalidad de los derechos enunciados en el Pacto en relación con la plena utilización de los recursos máximos disponibles del Estado Parte" (párr. 32)⁹⁶.

56. Por último, una vez que un Estado haya adoptado normas medioambientales en su legislación, deberá aplicarlas y cumplirlas. Como manifestó el Tribunal Europeo a este respecto, "una reglamentación que pretenda proteger derechos garantizados sería una medida ilusoria si no fuese observada debidamente"⁹⁷. Interpretando la Carta Africana, el Tribunal de Justicia de la Comunidad Económica de los Estados de África Occidental ha declarado que no basta con adoptar medidas si estas medidas solo quedan en el papel y no van acompañadas de medidas adicionales y concretas destinadas a impedir que se produzcan daños o asegurar la rendición de cuentas y la reparación efectiva del daño ambiental ocasionado⁹⁸. Asimismo, el Comité de Derechos Económicos, Sociales y Culturales ha dejado claro que el Pacto obliga a los Estados a abstenerse "de contaminar ilegalmente la atmósfera, el agua y la tierra, por ejemplo mediante los desechos industriales de las instalaciones propiedad del Estado" (Observación general N° 14, párr. 34), y de "reducir o contaminar ilícitamente el agua" (Observación general N° 15, párr. 21).

⁹⁴ *International Federation for Human Rights (FIDH) v. Greece*, N° 72/2011, 23 de enero de 2013, párrs. 42 a 44 y 148.

⁹⁵ Véanse, por ejemplo, *Dubetska and others v. Ukraine*, N° 30499/03, 10 de mayo de 2011, párr. 107 (normas nacionales); y *Fägerskiöld v. Sweden*, N° 37664/04, 26 de febrero de 2008 (normas de la OMS).

⁹⁶ Véase también la Observación general N° 15 del Comité, párr. 19.

⁹⁷ *Moreno Gómez v. Spain*, N° 4143/02, 16 de febrero de 2005, párr. 61. Véase también *Giacomelli v. Italy*, N° 59909/00, 26 de marzo de 2007, párr. 93.

⁹⁸ *SERAP v. Nigeria*, párr. 105.

57. También en este caso, los relatores especiales han adoptado posturas equivalentes respecto de los derechos correspondientes a sus mandatos⁹⁹. La Relatora Especial sobre el derecho humano al agua potable y el saneamiento, por ejemplo, ha destacado que "el éxito de la reglamentación no depende solo del establecimiento de normas, sino también de que existan entidades reguladoras sólidas e independientes. (...) Las entidades reguladoras deben tener la capacidad, en términos de recursos humanos, competencias, financiación e independencia que impida toda injerencia, para vigilar si se cumplen las normas, realizar inspecciones *in situ* e imponer multas y sanciones en caso de incumplimiento" (A/68/264, párr. 52).

2. Obligación de proteger contra los daños ambientales provocados por agentes privados

58. Como explicó el entonces Representante Especial para la cuestión de los derechos humanos y las empresas transnacionales y otras empresas, "el deber del Estado de ofrecer protección contra los abusos cometidos por agentes no estatales forma parte del fundamento mismo del régimen internacional de derechos humanos. Este deber exige que los Estados asuman una función esencial de regulación y arbitraje de los abusos cometidos por empresas comerciales o se arriesguen a incumplir sus obligaciones internacionales" (A/HRC/4/35, párr. 18). Estos abusos pueden incluir los daños ambientales que vulneren derechos humanos. El Representante Especial examinó 320 casos de presuntas vulneraciones de los derechos humanos relacionadas con empresas y descubrió que en cerca de un tercio de esos casos se denunciaban daños ambientales que afectaban a los derechos humanos, entre ellos el derecho a la vida, a la salud, a la alimentación y a la vivienda. En la mayoría de los casos, el daño directo a las comunidades implicaba impactos medioambientales (A/HRC/8/5/Add.2, párr. 67).

59. En los Principios Rectores sobre las empresas y los derechos humanos aprobados por el Consejo de Derechos Humanos en 2011 se afirma que los Estados deben, entre otras cosas, "proteger contra las violaciones de los derechos humanos cometidas en su territorio y/o su jurisdicción por terceros, incluidas las empresas", por ejemplo adoptando "medidas apropiadas para prevenir, investigar, castigar y reparar esos abusos mediante políticas adecuadas, actividades de reglamentación y sometimiento a la justicia" (A/HRC/17/31, principio 1). En estos Principios también queda claro que los Estados tienen la obligación de facilitar formas de reparación en caso de violaciones de derechos humanos por parte de empresas, y que las empresas, a su vez, tienen la obligación de respetar los derechos humanos. Estos tres pilares del marco normativo se aplican a las violaciones de derechos humanos relacionadas con el medio ambiente como las que se describieron en el anterior informe del Representante Especial.

60. Muchos otros órganos de derechos humanos han vinculado expresamente el deber de los Estados de proteger contra las violaciones de los derechos humanos cometidas por actores no estatales con las violaciones resultantes de la contaminación u otros daños ambientales. El Comité de Derechos Económicos, Sociales y Culturales ha observado que "las actividades empresariales pueden perjudicar al disfrute de los derechos

⁹⁹ Informe sobre los procedimientos especiales, secc. III.B (en que se citan declaraciones sobre el derecho a la salud, el derecho al agua, el derecho a la alimentación y el derecho a la vivienda).

reconocidos en el Pacto", por ejemplo mediante efectos nocivos para el medio ambiente natural, y ha reiterado la obligación de los Estados partes de "garantizar el pleno respeto de todos los derechos económicos, sociales y culturales enunciados en el Pacto y la adecuada protección de los titulares de los derechos en el marco de las actividades empresariales" (E/C.12/2011/1, párr. 1). En el contexto del derecho al agua, el Comité ha dejado claro que el deber de proteger este derecho se extiende a la adopción y aplicación de medidas eficaces para impedir que terceros vulneren este derecho mediante la contaminación de las fuentes de agua (Observación general N° 15 (2002), párrs. 23 y 44 b))¹⁰⁰.

61. La Comisión Africana ha afirmado que los gobiernos tienen el deber de proteger a sus ciudadanos, no solo mediante una legislación adecuada aplicada de manera efectiva, sino también ofreciendo protección contra posibles actuaciones nocivas de agentes privados, y ha declarado que, al permitir a las empresas petroleras incidir de manera devastadora en el bienestar de la comunidad ogoni, el Estado no estuvo a la altura de la conducta mínima esperada de un gobierno¹⁰¹. La Comisión Interamericana de Derechos Humanos ha señalado que "la implementación efectiva de estas normas de protección ambiental frente a particulares, en especial a las empresas e industrias extractivas, es requerida para evitar que el Estado sea internacionalmente responsable por violación de los derechos humanos de las comunidades afectadas por actividades destructivas del medio ambiente"¹⁰². A su vez, el Tribunal Europeo ha sostenido que los Estados están obligados a adoptar medidas efectivas para proteger de daños ambientales el derecho al respeto de la vida privada y familiar, independientemente de que la contaminación sea resultado de acciones gubernamentales o de actuaciones privadas. En ambos casos, "los principios aplicables son muy semejantes"¹⁰³.

3. Obligaciones relativas a daños ambientales transfronterizos

62. Muchas amenazas graves al disfrute de los derechos humanos se deben a daños ambientales transfronterizos, incluidos problemas de alcance mundial como la destrucción de la capa de ozono y el cambio climático. Ello lleva a plantearse si los Estados tienen la obligación de proteger los derechos humanos contra los efectos ambientales extraterritoriales de las medidas adoptadas en su territorio.

63. No hay motivos evidentes por los que un Estado no deba considerarse responsable de actuaciones que, en cualquier otro caso, constituirían un incumplimiento de sus obligaciones de derechos humanos por el mero hecho de que el daño se experimente fuera de sus fronteras. Aun así, la aplicación de las obligaciones de derechos humanos a los daños ambientales transfronterizos no siempre está clara. Una dificultad que se plantea es que los instrumentos de derechos humanos abordan las cuestiones relativas a la jurisdicción de distintas maneras. Algunos, como

¹⁰⁰ Pueden consultarse otras declaraciones del Comité en el informe ICESCR, secc. IV.B. Las declaraciones de los procedimientos especiales pueden consultarse en el informe sobre los procedimientos especiales, secc. IV.

¹⁰¹ Caso *Ogoniland*, párrs. 57 y 58.

¹⁰² Comisión Interamericana de Derechos Humanos. Segundo informe sobre la situación de las defensoras y los defensores de derechos humanos en las Américas. Disponible en: <https://www.oas.org/es/cidh/defensores/docs/pdf/defensores2011.pdf>. Véase, en general, el informe sobre la Comisión Interamericana de Derechos Humanos (informe CIDH), secc. IV.A.

¹⁰³ *López Ostra v. Spain*, N° 16798/90, 9 de diciembre de 1994, párr. 51; y *Hatton v. United Kingdom*, N° 36022/97, 8 de julio de 2003, párr. 98.

la Declaración Universal de Derechos Humanos y la Carta Africana, no contienen limitaciones jurisdiccionales expresas, y el Pacto Internacional de Derechos Económicos, Sociales y Culturales puede ofrecer incluso un fundamento explícito para las obligaciones extraterritoriales (art. 2, párr. 1). Sin embargo, otros tratados, como el Pacto Internacional de Derechos Civiles y Políticos, la Convención sobre los Derechos del Niño, el Convenio Europeo de Derechos Humanos y la Convención Americana sobre Derechos Humanos, limitan al menos algunas de sus protecciones a las personas situados bajo la jurisdicción del Estado o sometidas a ella, sin aclarar hasta qué punto esas protecciones se extienden más allá del territorio del Estado. Otro problema es que muchos órganos de derechos humanos no han abordado la extraterritorialidad en el contexto de los daños ambientales¹⁰⁴.

64. Aun así, la mayoría de las fuentes consultadas en que se aborda esta cuestión señalan que los Estados están obligados a proteger los derechos humanos, y en particular los derechos económicos, sociales y culturales, contra los efectos ambientales extraterritoriales de las medidas adoptadas en su territorio. El Comité de Derechos Económicos, Sociales y Culturales ha interpretado que el Pacto Internacional de Derechos Económicos, Sociales y Culturales exige a los Estados que son partes en él que se abstengan "de cualquier medida que obstaculice, directa o indirectamente, el ejercicio del derecho al agua potable en otros países" (Observación general N° 15, párr. 31), y ha declarado que las partes deben también adoptar medidas para impedir que terceros sujetos a su jurisdicción, como sus propios ciudadanos y empresas, violen el derecho al agua potable y a la salud en otros países (Observación general N° 15, párr. 33; y Observación general N° 14, párr. 39). Varios relatores especiales han realizado interpretaciones similares. En 2011, el Relator Especial sobre el derecho a la alimentación y la Relatora Especial sobre la extrema pobreza y los derechos humanos se unieron a académicos y activistas para aprobar los Principios de Maastricht sobre las Obligaciones Extraterritoriales de los Estados en el Área de los Derechos Económicos, Sociales y Culturales¹⁰⁵. La Relatora Especial sobre el derecho humano al agua potable y el saneamiento citó recientemente esos Principios, que "recalcan la obligación de los Estados de evitar que se causen daños extraterritorialmente" y "afirman la obligación de los Estados de proteger los derechos humanos extraterritorialmente, es decir, de adoptar las medidas necesarias para asegurar que los actores no estatales no anulen o menoscaben el disfrute de los derechos económicos, sociales y culturales. Ello implica que están obligados a evitar la contaminación de los cursos de agua en otras jurisdicciones y, en consecuencia, a regular la actuación de los agentes no estatales" (A/68/264, párr. 46).

65. Estas interpretaciones coinciden con la obligación fundamental de los Estados de cumplir los compromisos dimanantes de los tratados de buena fe¹⁰⁶, para lo cual deben evitar tomar medidas que frustren el objeto y el fin de dichos tratados¹⁰⁷. La Corte Internacional de Justicia ha interpretado que este principio de *pacta sunt servanda* exige a las partes en un tratado que lo

¹⁰⁴ Véase, por ejemplo, Consejo de Europa, *Manual*, pág. 25.

¹⁰⁵ http://www.etoconsortium.org/nc/en/library/maastricht-principles/?tx_drblob_pi1%5Bdownload%5D=23.

¹⁰⁶ Convención de Viena sobre el derecho de los tratados, art. 26.

¹⁰⁷ Mark E. Villiger, comentario a la Convención de Viena sobre el derecho de los tratados de 1969, 2009, pág. 367.

apliquen "razonablemente y de manera que pueda cumplirse su objetivo"¹⁰⁸. Esto indica que las partes en un tratado de derechos humanos no deberían comportarse de formas que dificulten a otras el cumplimiento de sus propias obligaciones en virtud de ese tratado¹⁰⁹.

66. Otras fuentes, como el Representante Especial del Secretario General para la cuestión de los derechos humanos y las empresas transnacionales y otras empresas, han adoptado una visión más restrictiva del alcance de las obligaciones extraterritoriales en materia de derechos humanos. El Representante Especial ha afirmado, sin embargo, que "a nivel internacional hay un creciente estímulo (...) de que los Estados de acogida adopten medidas regulatorias para prevenir los abusos de sus empresas en el extranjero" (A/HRC/8/5, párr. 19), y ha instado a los Estados a que tomen más medidas para evitar que las empresas vulneren los derechos humanos en el extranjero (A/HRC/14/27).

67. Aunque aún queda mucho por hacer para aclarar el contenido de las obligaciones extraterritoriales en materia de derechos humanos que se relacionan con el medio ambiente, esta falta de claridad total no debería impedir ver un aspecto básico: los Estados tienen la obligación de cooperar internacionalmente en materia de derechos humanos, y esta obligación figura no solo en tratados como el Pacto Internacional de Derechos Económicos, Sociales y Culturales (art. 2, párr. 1), sino también en la propia Carta de las Naciones Unidas (arts. 55 y 56). Esta obligación se aplica en particular a las amenazas ambientales mundiales contra los derechos humanos, como el cambio climático (A/HRC/10/61, párr. 99). Como señaló el Consejo de Derechos Humanos en su resolución 16/11, el principio 7 de la Declaración de Río establece que "(l)os Estados deberán cooperar con espíritu de solidaridad mundial para conservar, proteger y restablecer la salud y la integridad del ecosistema de la Tierra".

68. De hecho, gran parte del derecho ambiental internacional refleja los esfuerzos de los Estados por cooperar ante los desafíos transfronterizos y mundiales. Para la futura labor de aclarar las obligaciones extraterritoriales respecto de los daños ambientales que menoscaban los derechos humanos, podrá extraerse orientación de los instrumentos internacionales relativos al medio ambiente, muchos de los cuales incluyen disposiciones específicas para identificar y proteger los derechos de los afectados por esos daños¹¹⁰.

C. Obligaciones respecto de los miembros de grupos en situaciones vulnerables

69. Las obligaciones de derechos humanos relacionadas con el medio ambiente incluyen la obligación general de no discriminar en su aplicación. En particular, el derecho a una igual protección de la ley, consagrado en la Declaración Universal de Derechos Humanos (art. 7) y en muchos acuerdos de derechos humanos, incluye la protección igual en el marco de las leyes sobre el medio ambiente¹¹¹. Los Estados tienen obligaciones adicionales

¹⁰⁸ *Case concerning the Gabcikovo-Nagymaros project (Hungary/Slovakia)*, 1997, Corte Internacional de Justicia 7, párr. 142.

¹⁰⁹ Véase el principio 20 de los Principios de Maastricht.

¹¹⁰ Véanse el informe acerca de los acuerdos multilaterales sobre el medio ambiente, secc. IV. A, y el informe sobre la Convención de Aarhus.

¹¹¹ Véase Comisión Interamericana de Derechos Humanos, *Mossville Environmental Action Now c. los Estados Unidos*, N° 43/10, 17 de marzo de 2010 (interpretación del artículo II de la Declaración Americana).

respecto de los grupos especialmente vulnerables a los daños ambientales. En las secciones siguientes se describen las obligaciones específicas respecto de tres grupos concretos: las mujeres, los niños y los pueblos indígenas¹¹².

1. Mujeres

70. Al interpretar la Convención sobre la eliminación de todas las formas de discriminación contra la mujer, el Comité para la Eliminación de la Discriminación contra la Mujer subrayó que los Estados deben velar por que la participación del público en la adopción de decisiones sobre el medio ambiente, incluidas las políticas relativas al clima, incluya las preocupaciones y la participación de las mujeres¹¹³. De manera similar, el Relator Especial sobre el derecho a la salud ha declarado que "aunque las mujeres soportan una carga desproporcionada en la recogida de agua y en la eliminación de las aguas residuales de la familia, suelen ser excluidas de los procesos de adopción de decisiones pertinentes. Por lo tanto, los Estados deben tomar medidas para garantizar que no se excluya a las mujeres de los procesos de adopción de decisiones relativas a la gestión del abastecimiento de agua y el saneamiento" (A/62/214, párr. 84).

71. Con respecto a las obligaciones sustantivas de desarrollar y aplicar políticas para proteger los derechos humanos contra los daños ambientales, el Comité ha exhortado a los Estados a velar por que esas políticas apunten a proteger el derecho de las mujeres a la salud, la propiedad y el desarrollo. También ha instado a los Estados a realizar investigaciones sobre los efectos adversos de la contaminación ambiental en las mujeres, y a facilitar datos desglosados por sexo sobre dichos efectos¹¹⁴. En los casos en que los daños ambientales tienen efectos desproporcionados en las mujeres, los Estados tienen la obligación de adoptar y ejecutar programas para poner remedio a esa situación. El Relator Especial sobre las sustancias y los desechos peligrosos, por ejemplo, ha manifestado que, "habida cuenta de los efectos nocivos del mercurio en la función reproductiva de la mujer, el derecho internacional de los derechos humanos exige a los Estados partes que establezcan medidas preventivas y programas para proteger a las mujeres en edad reproductiva de la exposición al mercurio" (A/HRC/21/48, párr. 33, citando la Convención, art. 11, párr. 1 f)).

72. Algunos grupos de mujeres son particularmente vulnerables por distintos motivos, como la pobreza, la edad avanzada, la discapacidad y/o la condición de minoría, lo cual puede hacer necesaria una protección adicional. Por ejemplo, en su Recomendación general Nº 27 (2010), sobre las mujeres de edad y la protección de sus derechos humanos, el Comité concluyó que las mujeres son particularmente vulnerables a los desastres naturales y al cambio climático (párr. 25) y afirmó que, por lo tanto, "(l)os Estados partes deben velar por que las medidas para hacer frente al cambio climático y reducir el riesgo de desastres incluyan una perspectiva de género y tengan en cuenta las necesidades y vulnerabilidades de las mujeres de edad. También deben facilitar la participación de estas mujeres

¹¹² Esta no debe entenderse como una lista exhaustiva de los grupos en situación de vulnerabilidad. Al contrario, se podrían incluir otros grupos, como las minorías, las personas que viven en la pobreza extrema y los desplazados. Sin embargo, los grupos arriba mencionados son los que han recibido una atención más detallada en las fuentes examinadas.

¹¹³ Informe CEDAW, secc. III.A.1.

¹¹⁴ Informe CEDAW, seccs. III.A.2 y III.B.

en la toma de decisiones relativas a la mitigación del cambio climático y la adaptación a este" (párr. 35).

2. Niños

73. En la Convención sobre los Derechos del Niño se establece que, en todas las medidas concernientes a los niños que tomen, por ejemplo, las autoridades administrativas o los órganos legislativos, "una consideración primordial a que se atenderá será el interés superior del niño" (art. 3, párr. 1). En su Observación general N° 14 (2013), el Comité de los Derechos del Niño dejó claro que esta disposición se aplicaba a las medidas, como las regulaciones ambientales, que afectaran a los niños y otros grupos de población, y afirmó que, cuando una decisión "vaya a tener repercusiones importantes" para los niños, será preciso "adoptar un mayor nivel de protección y procedimientos detallados para tener en cuenta su interés superior" (párrs. 19 y 20).

74. Más concretamente, en el artículo 24, párrafo 2 c), de la Convención se establece que los Estados partes asegurarán la plena aplicación del derecho del niño al disfrute del más alto nivel posible de salud y, en particular, adoptarán las medidas apropiadas para "(c)ombatir las enfermedades y la malnutrición (...) mediante (...) el suministro de alimentos nutritivos adecuados y agua potable salubre, teniendo en cuenta los peligros y riesgos de contaminación del medio ambiente". En su Observación general N° 15 (2013), el Comité afirmó que, conforme al artículo 24, párrafo 2 c), los Estados "deben adoptar medidas para hacer frente a los peligros y riesgos que la contaminación del medio ambiente local plantea a la salud infantil", "regular y vigilar el impacto ambiental de las actividades empresariales que puedan poner en peligro el derecho del niño a la salud, su seguridad alimentaria y su acceso a agua potable y saneamiento" y "reservar a la salud infantil un lugar central en sus estrategias de adaptación al cambio climático y mitigación de sus consecuencias" (párrs. 49 y 50). En otras ocasiones el Comité ha destacado también la importancia de regular las empresas para proteger los derechos del niño, entre otras cosas contra los efectos de los daños ambientales (por ejemplo, en su Observación general N° 16 (2013), párr. 31).

75. En su Observación general N° 9 (2006), sobre los derechos de los niños con discapacidad, el Comité declaró que "(l)os países deberían establecer y aplicar políticas para impedir los vertidos de materiales peligrosos y otras formas de contaminación ambiental" y que, "(a)demás, deben establecerse directrices y salvaguardias estrictas para prevenir los accidentes por radiación" (párr. 54). En sus observaciones finales sobre los informes de los países, el Comité también ha instado a los Estados a reunir y presentar información sobre los posibles efectos de la contaminación ambiental en la salud de los niños y a abordar problemas medioambientales concretos¹¹⁵. Por último, en la Convención se establece que los Estados partes convienen en que la educación del niño deberá estar encaminada, entre otras cosas, a "(i)nculcar al niño el respeto del medio ambiente natural" (art. 29, párr. 1 e)).

3. Pueblos indígenas

76. Por su estrecha vinculación con el medio natural, los pueblos indígenas están particularmente expuestos a que los daños ambientales vulneren sus

¹¹⁵ El Comité también ha basado esas recomendaciones en otros derechos contemplados en la Convención sobre los Derechos del Niño, como el derecho a un nivel de vida adecuado (art. 27) y el derecho al descanso, al ocio y al juego (art. 31). Véase el informe CRC, secc. III.

derechos. Como declaró el Relator Especial sobre los derechos de los pueblos indígenas, "la realización de proyectos de extracción de recursos naturales y otros proyectos de desarrollo en territorios indígenas o en proximidad de ellos se ha convertido en una de las máximas preocupaciones de los pueblos indígenas de todo el mundo y posiblemente también en la fuente más generalizada de retos al pleno ejercicio de sus derechos" (A/HRC/18/35, párr. 57).

77. El Convenio N° 169 de la Organización Internacional del Trabajo y la Declaración de las Naciones Unidas sobre los derechos de los pueblos indígenas están diseñados para proteger los derechos de los pueblos indígenas, pero los órganos de derechos humanos también han interpretado otros acuerdos de derechos humanos en el sentido de que protegen esos derechos. Estas interpretaciones han llevado a conclusiones congruentes, por lo general, sobre las obligaciones de los Estados de proteger los derechos de los pueblos indígenas contra los daños ambientales. En sus informes, el Relator Especial sobre los derechos de los pueblos indígenas ha descrito en detalle las obligaciones de los Estados de proteger estos derechos¹¹⁶. En esta sección, por tanto, solo se esbozan algunos aspectos¹¹⁷.

78. En primer lugar, los Estados tienen la obligación de reconocer los derechos de los pueblos indígenas respecto de los territorios que han ocupado tradicionalmente, incluidos los recursos naturales de que dependen. En segundo lugar, los Estados están obligados a facilitar la participación de los pueblos indígenas en las decisiones que les afecten. El Relator Especial ha declarado que, salvo excepciones muy específicas, la regla general es que "no deben realizarse actividades extractivas dentro de los territorios de los pueblos indígenas sin su consentimiento libre, previo e informado" (A/HRC/24/41, párr. 27). En tercer lugar, antes de permitir actividades de desarrollo en territorios indígenas, los Estados deben prever una evaluación de los impactos ambientales de esas actividades. En cuarto lugar, los Estados deben asegurarse de que la comunidad indígena afectada reciba beneficios razonables de esas actividades de desarrollo. Y por último, los Estados deben facilitar acceso a reparaciones, con inclusión de indemnizaciones, por los daños causados por dichas actividades.

V. Conclusiones y recomendaciones

79. El derecho de los derechos humanos incluye obligaciones relacionadas con el medio ambiente. Esas obligaciones comprenden obligaciones de procedimiento de los Estados consistentes en evaluar el impacto ambiental en los derechos humanos y en publicar información relativa al medio ambiente, facilitar la participación en la toma de decisiones ambientales y dar acceso a recursos. La obligación de facilitar la participación pública incluye la obligación de proteger los derechos de expresión y de asociación contra las amenazas, el acoso y la violencia.

80. Las obligaciones de derechos humanos relacionadas con el medio ambiente incluyen también las obligaciones sustantivas de aprobar marcos jurídicos e institucionales que protejan contra los daños ambientales que interfieran en el disfrute de los derechos humanos,

¹¹⁶ Véase el informe sobre los pueblos indígenas.

¹¹⁷ Además de los informes del Relator Especial, este resumen se basa también en el informe ICESCR, secc. III.C; el informe ICCPR, secc. III.A; el informe ICERD, secc. III.B; y el informe interamericano, secc. III.C.

incluidos los daños ocasionados por actores privados. La obligación de proteger los derechos humanos de los daños ambientales no exige a los Estados que prohíban todas las actividades que puedan degradar el medio ambiente; los Estados pueden optar por lograr un equilibrio entre la protección del medio ambiente y otros intereses sociales legítimos. Sin embargo, este equilibrio debe ser razonable y no conducir a violaciones previsibles e injustificadas de los derechos humanos. Para determinar si un equilibrio es razonable, pueden resultar especialmente pertinentes las normas nacionales e internacionales relativas a la salud. También se desaconsejan enérgicamente las medidas regresivas.

81. Además de la exigencia general de no discriminar en la aplicación de las leyes sobre el medio ambiente, los Estados pueden tener obligaciones adicionales respecto de los miembros de grupos especialmente vulnerables a los daños ambientales. Estas obligaciones se han elaborado con cierto detalle en el caso de las mujeres, los niños y los pueblos indígenas, pero aún queda trabajo por hacer para aclarar las obligaciones relativas a otros grupos.

82. Hay también otras cuestiones que merecen mayor atención. Aunque está claro que los Estados tienen la obligación de cooperar a nivel internacional, lo que resulta claramente pertinente en el caso de problemas ambientales mundiales como el cambio climático, sigue siendo necesario aclarar el contenido de las obligaciones de derechos humanos relacionadas con el medio ambiente de carácter extraterritorial.

83. En otras esferas, las obligaciones están claras pero a veces no se cumplen. Preocupan particularmente al Experto independiente las muchas denuncias de falta de protección de los defensores de los derechos humanos que trabajan en la esfera del medio ambiente. El Experto independiente tiene previsto examinar las buenas prácticas en esta esfera con la esperanza de identificar modelos ejemplares de protección eficaz.

84. Las obligaciones de derechos humanos relacionadas con el medio ambiente siguen analizándose en numerosos foros, y el Experto independiente insta a los Estados a que presten apoyo para que se continúen desarrollando y aclarando. Dicho esto, las obligaciones son ya lo suficientemente claras como para poder orientar a los Estados y a todos los interesados en la promoción y protección de los derechos humanos y la protección del medio ambiente. La principal recomendación del Experto independiente es, por lo tanto, que los Estados y las demás entidades interesadas tengan en cuenta estas obligaciones de derechos humanos al elaborar y aplicar sus políticas sobre el medio ambiente.

2. Juan Antonio, Anna Rosario and Jose Alfonso Oposa & Others v. The Honorable Fulgencio S. Factoran, Jr., (Philippines, 1993)

DAVIDE, JR., J.:

In a broader sense, this petition bears upon the right of Filipinos to a balanced and healthful ecology which the petitioners dramatically associate with the twin concepts of "inter-generational responsibility" and "inter-generational justice."

Specifically, it touches on the issue of whether the said petitioners have a cause of action to "prevent the misappropriation or impairment" of Philippine rainforests and "arrest the unabated hemorrhage of the country's vital life support systems and continued rape of Mother Earth."

The controversy has its genesis in Civil Case No. 90-77 which was filed before Branch 66 (Makati, Metro Manila) of the Regional Trial Court (RTC), National Capital Judicial Region. The principal plaintiffs therein, now the principal petitioners, are all minors duly represented and joined by their respective parents. Impleaded as an additional plaintiff is the Philippine Ecological Network, Inc. (PENI), a domestic, non-stock and non-profit corporation organized for the purpose of, inter alia, engaging in concerted action geared for the protection of our environment and natural resources. The original defendant was the Honorable Fulgencio S. Factoran, Jr., then Secretary of the Department of Environment and Natural Resources (DENR). His substitution in this petition by the new Secretary, the Honorable Angel C. Alcala, was subsequently ordered upon proper motion by the petitioners. The complaint was instituted as a taxpayers' class suit and alleges that the plaintiffs "are all citizens of the Republic of the Philippines, taxpayers, and entitled to the full benefit, use and enjoyment of the natural resource treasure that is the country's virgin tropical forests." The same was filed for themselves and others who are equally concerned about the preservation of said resource but are "so numerous that it is impracticable to bring them all before the Court." The minors further asseverate that they "represent their generation as well as generations yet unborn." Consequently, it is prayed for that judgment be rendered:

. . . ordering defendant, his agents, representatives and other persons acting in his behalf to –

- (1) Cancel all existing timber license agreements in the country;
- (2) Cease and desist from receiving, accepting, processing, renewing or approving new timber license agreements.

and granting the plaintiffs ". . . such other reliefs just and equitable under the premises."

The complaint starts off with the general averments that the Philippine archipelago of 7,100 islands has a land area of thirty million (30,000,000) hectares and is endowed with rich, lush and verdant rainforests in which varied, rare and unique species of flora and fauna may be found; these rainforests contain a genetic, biological and chemical pool which is irreplaceable; they are also the habitat of indigenous Philippine cultures which have existed, endured and flourished since time immemorial; scientific evidence reveals that in order to maintain a balanced and healthful ecology, the country's land area should be utilized on the basis of a ratio of fifty-four per cent (54%) for forest cover and forty-six per cent (46%) for agricultural, residential, industrial, commercial and other uses; the distortion and disturbance of this balance as a consequence of deforestation have resulted in a host of

environmental tragedies, such as (a) water shortages resulting from drying up of the water table, otherwise known as the "aquifer," as well as of rivers, brooks and streams, (b) salinization of the water table as a result of the intrusion therein of salt water, incontrovertible examples of which may be found in the island of Cebu and the Municipality of Bacoor, Cavite, (c) massive erosion and the consequential loss of soil fertility and agricultural productivity, with the volume of soil eroded estimated at one billion (1,000,000,000) cubic meters per annum – approximately the size of the entire island of Catanduanes, (d) the endangering and extinction of the country's unique, rare and varied flora and fauna, (e) the disturbance and dislocation of cultural communities, including the disappearance of the Filipino's indigenous cultures, (f) the siltation of rivers and seabeds and consequential destruction of corals and other aquatic life leading to a critical reduction in marine resource productivity, (g) recurrent spells of drought as is presently experienced by the entire country, (h) increasing velocity of typhoon winds which result from the absence of windbreakers, (i) the floodings of lowlands and agricultural plains arising from the absence of the absorbent mechanism of forests, (j) the siltation and shortening of the lifespan of multi-billion peso dams constructed and operated for the purpose of supplying water for domestic uses, irrigation and the generation of electric power, and (k) the reduction of the earth's capacity to process carbon dioxide gases which has led to perplexing and catastrophic climatic changes such as the phenomenon of global warming, otherwise known as the "greenhouse effect."

Plaintiffs further assert that the adverse and detrimental consequences of continued and deforestation are so capable of unquestionable demonstration that the same may be submitted as a matter of judicial notice. This notwithstanding, they expressed their intention to present expert witnesses as well as documentary, photographic and film evidence in the course of the trial.

As their cause of action, they specifically allege that:

CAUSE OF ACTION

1. Plaintiffs replead by reference the foregoing allegations.
2. Twenty-five (25) years ago, the Philippines had some sixteen (16) million hectares of rainforests constituting roughly 53% of the country's land mass.
3. Satellite images taken in 1987 reveal that there remained no more than 1.2 million hectares of said rainforests or four per cent (4.0%) of the country's land area.
4. More recent surveys reveal that a mere 850,000 hectares of virgin oldgrowth rainforests are left, barely 2.8% of the entire land mass of the Philippine archipelago and about 3.0 million hectares of immature and uneconomical secondary growth forests.
5. Public records reveal that the defendants' predecessors have granted timber license agreements ('TLA's') to various corporations to cut the aggregate area of 3.89 million hectares for commercial logging purposes. . . .

6. At the present rate of deforestation, i.e. about 200,000 hectares per annum or 25 hectares per hour – nighttime, Saturdays, Sundays and holidays included – the Philippines will be bereft of forest resources after the end of this ensuing decade, if not earlier.

7. The adverse effects, disastrous consequences, serious injury and irreparable damage of this continued trend of deforestation to the plaintiff minor's generation and to generations yet unborn are evident and incontrovertible. As a matter of fact, the environmental damages enumerated in paragraph 6 hereof are already being felt, experienced and suffered by the generation of plaintiff adults.

8. The continued allowance by defendant of TLA holders to cut and deforest the remaining forest stands will work great damage and irreparable injury to plaintiffs – especially plaintiff minors and their successors – who may never see, use, benefit from and enjoy this rare and unique natural resource treasure.

This act of defendant constitutes a misappropriation and/or impairment of the natural resource property he holds in trust for the benefit of plaintiff minors and succeeding generations.

9. Plaintiffs have a clear and constitutional right to a balanced and healthful ecology and are entitled to protection by the State in its capacity as the *parens patriae*.

10. Plaintiffs have exhausted all administrative remedies with the defendant's office. On March 2, 1990, plaintiffs served upon defendant a final demand to cancel all logging permits in the country.

11. Defendant, however, fails and refuses to cancel the existing TLA's to the continuing serious damage and extreme prejudice of plaintiffs.

12. The continued failure and refusal by defendant to cancel the TLA's is an act violative of the rights of plaintiffs, especially plaintiff minors who may be left with a country that is desertified (sic), bare, barren and devoid of the wonderful flora, fauna and indigenous cultures which the Philippines had been abundantly blessed with.

13. Defendant's refusal to cancel the aforementioned TLA's is manifestly contrary to the public policy enunciated in the Philippine Environmental Policy which, in pertinent part, states that it is the policy of the State –

(a) to create, develop, maintain and improve conditions under which man and nature can thrive in productive and enjoyable harmony with each other;

(b) to fulfill the social, economic and other requirements of present and future generations of Filipinos and;

(c) to ensure the attainment of an environmental quality that is conducive to a life of dignity and well-being. (P.D. 1151, 6 June 1977)

14. Furthermore, defendant's continued refusal to cancel the aforementioned TLA's is contradictory to the Constitutional policy of the State to –

a. effect "a more equitable distribution of opportunities, income and wealth" and "make full and efficient use of natural resources (sic)." (Section 1, Article XII of the Constitution);

b. "protect the nation's marine wealth." (Section 2, *ibid*);

c. "conserve and promote the nation's cultural heritage and resources (sic)" (Section 14, Article XIV, *id.*);

d. "protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature." (Section 16, Article II, *id.*)

15. Finally, defendant's act is contrary to the highest law of humankind – the natural law – and violative of plaintiffs' right to self-preservation and perpetuation.

16. There is no other plain, speedy and adequate remedy in law other than the instant action to arrest the unabated hemorrhage of the country's vital life support systems and continued rape of Mother Earth.

On 22 June 1990, the original defendant, Secretary Factoran, Jr., filed a Motion to Dismiss the complaint based on two (2) grounds, namely: (1) the plaintiffs have no cause of action against him and (2) the issue raised by the plaintiffs is a political question which properly pertains to the legislative or executive branches of Government.

In their 12 July 1990 Opposition to the Motion, the petitioners maintain that (1) the complaint shows a clear and unmistakable cause of action, (2) the motion is dilatory and (3) the action presents a justiciable question as it involves the defendant's abuse of discretion.

On 18 July 1991, respondent Judge issued an order granting the aforementioned motion to dismiss. . . .

On 14 May 1992, We resolved to give due course to the petition

Petitioners contend that the complaint clearly and unmistakably states a cause of action as it contains sufficient allegations concerning their right to a sound environment based on Articles 19, 20 and 21 of the Civil Code (Human Relations), Section 4 of Executive Order (E.O.) No. 192 creating the DENR, Section 3 of Presidential Decree (P.D.) No. 1151 (Philippine Environmental Policy), Section 16, Article II of the 1987 Constitution recognizing the right of the people to a balanced

and healthful ecology, the concept of generational genocide in Criminal Law and the concept of man's inalienable right to self-preservation and self-perpetuation embodied in natural law. Petitioners likewise rely on the respondent's correlative obligation per Section 4 of E.O. No. 192, to safeguard the people's right to a healthful environment.

It is further claimed that the issue of the respondent Secretary's alleged grave abuse of discretion in granting Timber License Agreements (TLAs) to cover more areas for logging than what is available involves a judicial question.

Anent the invocation by the respondent Judge of the Constitution's non-impairment clause, petitioners maintain that the same does not apply in this case because TLAs are not contracts. They likewise submit that even if TLAs may be considered protected by the said clause, it is well settled that they may still be revoked by the State when the public interest so requires.

On the other hand, the respondents aver that the petitioners failed to allege in their complaint a specific legal right violated by the respondent Secretary for which any relief is provided by law. They see nothing in the complaint but vague and nebulous allegations concerning an "environmental right" which supposedly entitles the petitioners to the "protection by the state in its capacity as *parens patriae*." Such allegations, according to them, do not reveal a valid cause of action. They then reiterate the theory that the question of whether logging should be permitted in the country is a political question which should be properly addressed to the executive or legislative branches of Government. They therefore assert that the petitioners' resources is not to file an action to court, but to lobby before Congress for the passage of a bill that would ban logging totally.

As to the matter of the cancellation of the TLAs, respondents submit that the same cannot be done by the State without due process of law. Once issued, a TLA remains effective for a certain period of time – usually for twenty-five (25) years. During its effectivity, the same can neither be revised nor cancelled unless the holder has been found, after due notice and hearing, to have violated the terms of the agreement or other forestry laws and regulations. Petitioners' proposition to have all the TLAs indiscriminately cancelled without the requisite hearing would be violative of the requirements of due process.

Before going any further, we must first focus on some procedural matters. Petitioners instituted Civil Case No. 90-777 as a class suit. The original defendant and the present respondents did not take issue with this matter. Nevertheless, We hereby rule that the said civil case is indeed a class suit. The subject matter of the complaint is of common and general interest not just to several, but to all citizens of the Philippines.

Consequently, since the parties are so numerous, it, becomes impracticable, if not totally impossible, to bring all of them before the court. We likewise declare that the plaintiffs therein are numerous and representative enough to ensure the full

protection of all concerned interests. Hence, all the requisites for the filing of a valid class suit under Section 12, Rule 3 of the Revised Rules of Court are present both in the said civil case and in the instant petition, the latter being but an incident to the former.

This case, however, has a special and novel element. Petitioners minors assert that they represent their generation as well as generations yet unborn. We find no difficulty in ruling that they can, for themselves, for others of their generation and for the succeeding generations, file a class suit. Their personality to sue in behalf of the succeeding generations can only be based on the concept of intergenerational responsibility insofar as the right to a balanced and healthful ecology is concerned. Such a right, as hereinafter expounded, considers the "rhythm and harmony of nature." Nature means the created world in its entirety.

Such rhythm and harmony indispensably include, inter alia, the judicious disposition, utilization, management, renewal and conservation of the country's forest, mineral, land, waters, fisheries, wildlife, off-shore areas and other natural resources to the end that their exploration, development and utilization be equitably accessible to the present as well as future generations. Needless to say, every generation has a responsibility to the next to preserve that rhythm and harmony for the full enjoyment of a balanced and healthful ecology. Put a little differently, the minors' assertion of their right to a sound environment constitutes, at the same time, the performance of their obligation to ensure the protection of that right for the generations to come.

The locus standi of the petitioners having thus been addressed, we shall now proceed to the merits of the petition.

After a careful perusal of the complaint in question and a meticulous consideration and evaluation of the issues raised and arguments adduced by the parties, we do not hesitate to find for the petitioners and rule against the respondent Judge's challenged order for having been issued with grave abuse of discretion amounting to lack of jurisdiction.

We do not agree with the trial court's conclusions that the plaintiffs failed to allege with sufficient definiteness a specific legal right involved or a specific legal wrong committed, and that the complaint is replete with vague assumptions and conclusions based on unverified data. A reading of the complaint itself belies these conclusions. The complaint focuses on one specific fundamental legal right — the right to a balanced and healthful ecology which, for the first time in our nation's constitutional history, is solemnly incorporated in the fundamental law. Section 16, Article II of the 1987 Constitution explicitly provides:

Sec. 16. The State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature.

This right unites with the right to health which is provided for in the preceding section of the same article:

Sec. 15. The State shall protect and promote the right to health of the people and instill health consciousness among them.

While the right to a balanced and healthful ecology is to be found under the Declaration of Principles and State Policies and not under the Bill of Rights, it does not follow that it is less important than any of the civil and political rights enumerated in the latter. Such a right belongs to a different category of rights altogether for it concerns nothing less than self-preservation and self-perpetuation – aptly and fittingly stressed by the petitioners – the advancement of which may even be said to predate all governments and constitutions. As a matter of fact, these basic rights need not even be written in the Constitution for they are assumed to exist from the inception of humankind. If they are now explicitly mentioned in the fundamental charter, it is because of the well-founded fear of its framers that unless the rights to a balanced and healthful ecology and to health are mandated as state policies by the Constitution itself, thereby highlighting their continuing importance and imposing upon the state a solemn obligation to preserve the first and protect and advance the second, the day would not be too far when all else would be lost not only for the present generation, but also for those to come – generations which stand to inherit nothing but parched earth incapable of sustaining life.

The right to a balanced and healthful ecology carries with it the correlative duty to refrain from impairing the environment. . . .

The said right implies, among many other things, the judicious management and conservation of the country's forests. Without such forests, the ecological or environmental balance would be irreversibly disrupted.

Conformably with the enunciated right to a balanced and healthful ecology and the right to health, as well as the other related provisions of the Constitution concerning the conservation, development and utilization of the country's natural resources, then President Corazon C. Aquino promulgated on 10 June 1987 E.O. No. 192, 14 Section 4 of which expressly mandates that the Department of Environment and Natural Resources "shall be the primary government agency responsible for the conservation, management, development and proper use of the country's environment and natural resources, specifically forest and grazing lands, mineral, resources, including those in reservation and watershed areas, and lands of the public domain, as well as the licensing and regulation of all natural resources as may be provided for by law in order to ensure equitable sharing of the benefits derived therefrom for the welfare of the present and future generations of Filipinos." Section 3 thereof makes the following statement of policy:

Sec. 3. Declaration of Policy. – It is hereby declared the policy of the State to ensure the sustainable use, development, management, renewal, and conservation of the country's forest, mineral, land, off-shore areas and other natural resources, including the protection and enhancement of the quality of the environment, and equitable access of the different segments of the

population to the development and the use of the country's natural resources, not only for the present generation but for future generations as well. It is also the policy of the state to recognize and apply a true value system including social and environmental cost implications relative to their utilization, development and conservation of our natural resources.

This policy declaration is substantially re-stated in Title XIV, Book IV of the Administrative Code of 1987, 15 specifically in Section 1 thereof

Thus, the right of the petitioners (and all those they represent) to a balanced and healthful ecology is as clear as the DENR's duty – under its mandate and by virtue of its powers and functions under E.O. No. 192 and the Administrative Code of 1987 – to protect and advance the said right.

A denial or violation of that right by the other who has the correlative duty or obligation to respect or protect the same gives rise to a cause of action. Petitioners maintain that the granting of the TLAs, which they claim was done with grave abuse of discretion, violated their right to a balanced and healthful ecology; hence, the full protection thereof requires that no further TLAs should be renewed or granted.

A cause of action is defined as:

...an act or omission of one party in violation of the legal right or rights of the other; and its essential elements are legal right of the plaintiff, correlative obligation of the defendant, and act or omission of the defendant in violation of said legal right.

It is settled in this jurisdiction that in a motion to dismiss based on the ground that the complaint fails to state a cause of action, the question submitted to the court for resolution involves the sufficiency of the facts alleged in the complaint itself. No other matter should be considered; furthermore, the truth or falsity of the said allegations is beside the point for the truth thereof is deemed hypothetically admitted. The only issue to be resolved in such a case is: admitting such alleged facts to be true, may the court render a valid judgment in accordance with the prayer in the complaint? . . .

After careful examination of the petitioners' complaint, We find the statements under the introductory affirmative allegations, as well as the specific averments under the subheading CAUSE OF ACTION, to be adequate enough to show, prima facie, the claimed violation of their rights. On the basis thereof, they may thus be granted, wholly or partly, the reliefs prayed for. It bears stressing, however, that insofar as the cancellation of the TLAs is concerned, there is the need to implead, as party defendants, the grantees thereof for they are indispensable parties. . . .

The last ground invoked by the trial court in dismissing the complaint is the nonimpairment of contracts clause found in the Constitution. The court a quo declared that:

The Court is likewise of the impression that it cannot, no matter how we stretch our jurisdiction, grant the reliefs prayed for by the plaintiffs, i.e., to cancel all existing timber license agreements in the country and to cease and desist from receiving, accepting, processing, renewing or approving new timber license agreements. For to do otherwise would amount to "impairment of contracts" abhorred (sic) by the fundamental law.

We are not persuaded at all; on the contrary, We are amazed, if not shocked, by such a sweeping pronouncement. In the first place, the respondent Secretary did not, for obvious reasons, even invoke in his motion to dismiss the non-impairment clause. If he had done so, he would have acted with utmost infidelity to the Government by providing undue and unwarranted benefits and advantages to the timber license holders because he would have forever bound the Government to strictly respect the said licenses according to their terms and conditions regardless of changes in policy and the demands of public interest and welfare. He was aware that as correctly pointed out by the petitioners, into every timber license must be read Section 20 of the Forestry Reform Code (P.D. No. 705) which provides:

. . . Provided, That when the national interest so requires, the President may amend, modify, replace or rescind any contract, concession, permit, licenses or any other form of privilege granted herein . . .

Needless to say, all licenses may thus be revoked or rescinded by executive action. It is not a contract, property or a property right protested by the due process clause of the Constitution. . . .

WHEREFORE, being impressed with merit, the instant Petition is hereby GRANTED, and the challenged Order of respondent Judge of 18 July 1991 dismissing Civil Case No. 90-777 is hereby set aside. The petitioners may therefore amend their complaint to implead as defendants the holders or grantees of the questioned timber license agreements.

3. Robinson Township. v. Commonwealth of Pennsylvania (Pennsylvania, U.S. 2013)

[Note: The Pennsylvania Supreme Court has 7 members; Justice Castille wrote on behalf of a 3-person plurality. Justice Baer concurred. Justice Saylor dissented, and was joined by 2 other justices. This is a highly redacted version of a 120 page opinion. Internal references and text are omitted without notation.]

Chief Justice CASTILLE.

In this matter, multiple issues of constitutional import arise in cross-appeals taken from the decision of the Commonwealth Court ruling upon expedited challenges to Act 13 of 2012, a statute amending the Pennsylvania Oil and Gas Act (“Act 13”). Act 13 comprises sweeping legislation affecting Pennsylvania’s environment and, in particular, the exploitation and recovery of natural gas in a geological formation known as the Marcellus Shale. The litigation proceeded below in an accelerated fashion, in part because the legislation itself was designed to take effect quickly and imposed obligations which required the challengers to formulate their legal positions swiftly; and in part in recognition of the obvious economic importance of the legislation to the Commonwealth and its citizens.

The litigation implicates, among many other sources of law, a provision of this Commonwealth’s organic charter, specifically Section 27 of the Declaration of Rights in the Pennsylvania Constitution, which states:

“The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania’s public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.”

PA. CONST. art. I, § 27 (the “Environmental Rights Amendment”).

Following careful deliberation, this Court holds that several challenged provisions of Act 13 are unconstitutional, albeit the Court majority affirming the finding of unconstitutionality is not of one mind concerning the ground for decision. This Opinion, representing the views of this author, Madame Justice Todd, and Mr. Justice McCaffery, finds that several core provisions of Act 13 violate the Commonwealth’s duties as trustee of Pennsylvania’s public natural resources under the Environmental Rights Amendment; other challenges lack merit; and still further issues require additional examination in the Commonwealth Court. Mr. Justice Baer, in concurrence, concurs in the mandate, and joins the Majority Opinion in all parts except Parts III and VI(C); briefly stated, rather than grounding merits affirmance in the Environmental Rights Amendment, Justice Baer would find that the core

constitutional infirmity sounds in substantive due process. Accordingly, we affirm in part and reverse in part the Commonwealth Court's decision, and remand for further proceedings consistent with specific directives later set forth in this Opinion. See Part VI (Conclusion and Mandate).

I. Background

The Marcellus Shale Formation has been a known natural gas reservoir (containing primarily methane) for more than 75 years. Particularly in northeastern Pennsylvania, the shale rock is organic-rich and thick. Early drilling efforts revealed that the gas occurred in "pockets" within the rock formations, and that the flow of natural gas from wells was not continuous. Nonetheless, geological surveys in the 1970s showed that the Marcellus Shale Formation had "excellent potential to fill the needs of users" if expected technological development continued and natural gas prices increased. Those developments materialized and they permitted shale drilling in the Marcellus Formation to start in 2003; production began in 2005.

In shale formations, organic matter in the soil generates gas molecules that absorb onto the matrix of the rock. Over time, tectonic and hydraulic stresses fracture the rock and natural gas (e.g., methane) migrates to fill the fractures or pockets. In the Marcellus Shale Formation, fractures in the rock and naturally-occurring gas pockets are insufficient in size and number to sustain consistent industrial production of natural gas. The industry uses two techniques that enhance recovery of natural gas from these "unconventional" gas wells: hydraulic fracturing or "fracking" (usually slick-water fracking) and horizontal drilling. Both techniques inevitably do violence to the landscape. Slick-water fracking involves pumping at high pressure into the rock formation a mixture of sand and freshwater treated with a gel friction reducer, until the rock cracks, resulting in greater gas mobility. Horizontal drilling requires the drilling of a vertical hole to 5,500 to 6,500 feet—several hundred feet above the target natural gas pocket or reservoir—and then directing the drill bit through an arc until the drilling proceeds sideways or horizontally. One unconventional gas well in the Marcellus Shale uses several million gallons of water. The development of the natural gas industry in the Marcellus Shale Formation prompted enactment of Act 13.

In February 2012, the Governor of Pennsylvania, Thomas W. Corbett, signed Act 13 into law. Act 13 repealed parts of the existing Pennsylvania Oil and Gas Act and added provisions re-codified into six new chapters in Title 58 of the Pennsylvania Consolidated Statutes. The new chapters of the Oil and Gas Act are:

- Chapter 23, which establishes a fee schedule for the unconventional gas well industry, and provides for the collection and distribution of these fees;
- Chapter 25, which provides for appropriation and allocation of funds from the Oil and Gas Lease Fund;

- Chapter 27, which creates a natural gas energy development program to fund public or private projects for converting vehicles to utilize natural gas fuel;
- Chapter 32, which describes the well permitting process and defines statewide limitations on oil and gas development;
- Chapter 33, which prohibits any local regulation of oil and gas operations, including via environmental legislation, and requires statewide uniformity among local zoning ordinances with respect to the development of oil and gas resources;
- Chapter 35, which provides that producers, rather than landowners, are responsible for payment of the unconventional gas well fees authorized under Chapter 23.

See 58 Pa.C.S. §§ 2301–3504. Chapter 23’s fee schedule became effective immediately upon Act 13 being signed into law, on February 14, 2012, while the remaining chapters were to take effect sixty days later, on April 16, 2012.

III. The Constitutionality of Act 13

As noted, on the merits, the Commonwealth Court held that certain specific provisions of Act 13 were unconstitutional. The *en banc* panel enjoined enforcement of Sections 3215(b)(4) and 3304 of Act 13, and of those provisions of Chapter 33 which enforce Section 3304. The effect of the injunction was to prohibit the Department of Environmental Protection from granting waivers of mandatory setbacks from certain types of waters of the Commonwealth, and to permit local government to enforce existing zoning ordinances, and adopt new ordinances, that diverge from the Act 13 legal regime, without concern for the legal or financial consequences that would otherwise attend non-compliance with Act 13.

The Commonwealth Court rejected the citizens’ remaining claims. Specifically, the panel sustained the Commonwealth’s preliminary objections to claims: (1) that provisions of Act 13 violate the Environmental Rights Amendment, Article I, Section 27 of the Pennsylvania Constitution ...

* * * *

By any measure, the citizens argue, Act 13 works a remarkable revolution in zoning in this Commonwealth. The Act introduces heavy-duty industrial uses—natural gas development and processing, including permission to store wastewater (a drilling by-product)—into all existing zoning districts as of right, including residential, agricultural, and commercial. The intrusion is made, according to the citizens, regardless of whether the district is suitable for industrial use, whether the industrial use is compatible with existing uses and expectations, and whether dictated accompanying setbacks are sufficient to protect the environmental health, safety, and welfare of residents in particular affected communities. The citizens describe the development process of shale drilling for natural gas.

* * * *

For example, one affidavit of record recounts the experience of a homeowner in a previously rural, non-industrialized area of Amwell Township, Washington County. The homeowner, a nurse, leased her mineral rights and drilling operations (three wells, a fracking fluid impoundment, and a drill cuttings pit) began approximately 1,500 feet from her home. Access to the drilling site occurred mainly via a dirt road running approximately fifteen feet from her residence. The homeowner describes that, during the initial construction process, the access road was used daily and continuously by heavy truck traffic, causing structural damage to her home's foundation, road collapse, as well as large amounts of dust and deterioration to the air quality; the gas company subsequently repaired the damage to her home, and widened and paved the access road to accommodate additional traffic. Moreover, and unsurprisingly, the 24-hour-a-day traffic caused significant noise pollution, which affected the homeowner's ability to enjoy her property.

Once drilling and fracking operations began, and over the next several years, the homeowner noticed significant degradation in the quality of the well water which had supplied her homestead and those of several neighbors with fresh and clean water during the century in which her family had owned the property. In the homeowner's words: "my well water began to stink like rotten eggs and garbage with a sulfur chemical smell[,] ... when running water to take a bath, my bathtub filled with black sediment and again smelled like rotten eggs." The gas company gave the homeowner a "water buffalo" as a replacement water source. Air quality also became degraded, beginning "to smell of rotten eggs, sulfur, and chemicals" and seeping into the home and the owner's belongings. Several pets died as a result of their exposure to contaminated water. Finally, upon her physician's advice, the homeowner abandoned her family home because the exposure to the toxic water and air caused her and her children severe health problems such as constant and debilitating headaches, nosebleeds, nausea, difficulty and shortness of breath, skin rashes and lesions, bone and muscle pain, inability to concentrate, and severe fatigue.

Moreover, the citizens state, communities "have a reasonable concern over the impact on property values due to the perceived or real risk associated with living near industrial activity." Property values, according to the citizens, will decrease with the prospect of storing drilling wastewater "less than a football field's distance from ... homes," and the prospect of contamination of the soil, air, and water supply. The citizens state that they "relied on the zoning ordinances in their respective municipalities to protect their investments in their homes and businesses, and to provide safe, healthy, and desirable places in which to live, work, raise families, and engage in recreational activities." Act 13's blunt "one size-fits-all" accommodation of the oil and gas industry, the citizens argue, will change the character of existing residential neighborhoods and affect planning for future orderly growth in municipalities with significant shale gas reserves, the very neighborhoods which zoning laws encouraged and currently protect. One aspect of the new law, for example, provides for setbacks of 300 feet from "existing structures," which does

not account for currently undeveloped properties or large parcels, much less roads and property lines. In more sparsely-populated rural communities, the effect of Act 13 will be, according to the citizens, “unlimited drilling; drilling rigs and transportation of the same; flaring, including carcinogenic and hazardous emissions; damage to roads; an unbridled spider web of pipeline; installation, construction and placement of impoundment areas; compressor stations and processing plants; and unlimited hours of operation, all of which may take place in residentially zoned areas.” The citizens conclude that, as a zoning regulation, Act 13 fails to meet the standards of Article I, Section 1 of the Pennsylvania Constitution, the Fourteenth Amendment of the U.S. Constitution, and the caselaw that interprets those respective constitutional provisions.

* * * *

According to the citizens, the Commonwealth Court erred in failing to recognize that the municipalities’ fiduciary obligation under Section 27 to evaluate short-term and long-term discrete and cumulative effects on public resources continues to exist even though the General Assembly bluntly sought to occupy the field of environmental regulation insofar as the oil and gas industry is concerned. These oil and gas operations, according to the citizens, present risks and “will cause degradation and diminution of trust resources” protected by the Environmental Rights Amendment. The citizens claim that Act 13 removes the municipalities’ capacity to evaluate and react appropriately and meaningfully to the potential impact of oil and gas operations and, as a result, impedes the municipalities’ ability to comply with their constitutional duties. The basic error, the citizens state, derives from the conclusion that the Municipalities Planning Code is the source of the municipalities’ obligations rather than the Constitution. A statutory enactment such as Act 13 simply cannot eliminate organic constitutional obligations.

The Commonwealth responds that Act 13 does not violate the Environmental Rights Amendment, found in Section 27 of Article I of our charter. According to the Commonwealth, municipalities have no powers outside those granted by the General Assembly, and the General Assembly has acted via Act 13 to preempt the field and excuse any obligation that municipalities may have had previously “to plan for environmental concerns for oil and gas operations.” Section 27, the Commonwealth states, is not a basis to expand the trustee role or the powers of governmental entities, such as municipalities, beyond those granted by the General Assembly. The Commonwealth argues that, “[t]hrough the legislative process,” the General Assembly balanced Section 27 concerns, and the constitutional provision does not confer a right upon the municipalities to challenge the General Assembly’s policy judgments or for citizens to oppose actions of the General Assembly with which they disagree.

The Commonwealth adds that Section 27 “provides specific constitutional authority for the [General Assembly] to enact laws like Act 13 which serve to manage and protect the environment while allowing for the development of Pennsylvania’s valuable natural resources.” Moreover, while the Commonwealth agrees that municipalities have some duties and responsibilities under Section 27, the

Commonwealth disputes that Section 27 grants municipalities any power to protect public natural resources beyond that granted by the General Assembly. The Commonwealth claims that, as named trustee, the sovereign is “plainly” given “the authority and the obligation to control Pennsylvania’s natural resources.” The municipalities have no power to assert authority under Section 27 “as against the Legislature.” In short, the Commonwealth’s position is that the Environmental Rights Amendment recognizes or confers no right upon citizens and no right or inherent obligation upon municipalities; rather, the constitutional provision exists only to guide the General Assembly, which alone determines what is best for public natural resources, and the environment generally, in Pennsylvania. The Commonwealth thus requests that we affirm the decision of the Commonwealth Court in this respect.

Article I is the Commonwealth’s Declaration of Rights, which delineates the terms of the social contract between government and the people that are of such “general, great and essential” quality as to be ensconced as “inviolable.” PA. CONST. art. I, Preamble & § 25; see also PA. CONST. art. I, § 2 (“All power is inherent in the people, and all free governments are founded on their authority and instituted for their peace, safety and happiness.”); accord *Edmunds*, 586 A.2d at 896 (since 1776, Declaration of Rights has been “organic part” of Constitution, and “appear[s] (not coincidentally) first in that document”). The Declaration of Rights assumes that the rights of the people articulated in Article I of our Constitution—vis-à-vis the government created by the people—are inherent in man’s nature and preserved rather than created by the Pennsylvania Constitution. ... accord *Edmunds*, 586 A.2d at 896 (Pennsylvania’s original constitution of 1776 “reduce[d] to writing a deep history of unwritten legal and moral codes which had guided the colonists from the beginning of William Penn’s charter in 1681.”). This concept is illustrated in the basic two-part scheme of our Constitution, which has persisted since the original post-colonial document: one part establishes a government and another part limits that government’s powers. ... The Declaration of Rights is that general part of the Pennsylvania Constitution which limits the power of state government; additionally, “particular sections of the Declaration of Rights represent specific limits on governmental power.”

The first section of Article I “affirms, among other things, that all citizens ‘have certain inherent and inalienable rights.’ ” ... Among the inherent rights of the people of Pennsylvania are those enumerated in Section 27, the Environmental Rights Amendment:

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania’s public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

PA. CONST. art. I, § 27 (Natural resources and the public estate).

Before examining the application of Section 27 to the controversy before us, it is necessary to identify and appreciate the rights protected by this provision of the Constitution. ... Much as is the case with other Declaration of Rights provisions, Article I, Section 27 articulates principles of relatively broad application, whose development in practice often is left primarily to the judicial and legislative branches. ... Articulating judicial standards in the realm of constitutional rights may be a difficult task, as our developing jurisprudence vis-à-vis rights affirmed in the Pennsylvania Constitution well before environmental rights amply shows. ...

The actions brought under Section 27 since its ratification, which we will describe further below, have provided this Court with little opportunity to develop a comprehensive analytical scheme based on the constitutional provision. Moreover, it would appear that the jurisprudential development in this area in the lower courts has weakened the clear import of the plain language of the constitutional provision in unexpected ways. As a jurisprudential matter (and, as we explain below, as a matter of substantive law), these precedents do not preclude recognition and enforcement of the plain and original understanding of the Environmental Rights Amendment. ... The matter now before us offers appropriate circumstances to undertake the necessary explication of the Environmental Rights Amendment, including foundational matters. ...

4. Plain language

Initially, we note that the Environmental Rights Amendment accomplishes two primary goals, via prohibitory and non-prohibitory clauses: (1) the provision identifies protected rights, to prevent the state from acting in certain ways, and (2) the provision establishes a nascent framework for the Commonwealth to participate affirmatively in the development and enforcement of these rights. Section 27 is structured into three mandatory clauses that define rights and obligations to accomplish these twin purposes; and each clause mentions “the people.”

A legal challenge pursuant to Section 27 may proceed upon alternate theories that either the government has infringed upon citizens’ rights or the government has failed in its trustee obligations, or upon both theories, given that the two paradigms, while serving different purposes in the amendatory scheme, are also related and overlap to a significant degree. *Accord* 1970 Pa. Legislative Journal–House 2269, 2272 (April 14, 1970) (Section 27 “can be viewed almost as two separate bills—albeit there is considerable interaction between them, and the legal doctrines invoked by each should tend mutually to support and reinforce the other because of their inclusion in a single amendment.”). Facing a claim premised upon Section 27 rights and obligations, the courts must conduct a principled analysis of whether the Environmental Rights Amendment has been violated. See *Payne*, 361 A.2d at 273.

To determine the merits of a claim that the General Assembly’s exercise of its police power is unconstitutional, we inquire into more than the intent of the legislative body and focus upon the effect of the law on the right allegedly violated. The General Assembly’s declaration of policy does not control the judicial inquiry into constitutionality. Indeed, “for this Court to accept the notion that legislative

pronouncements of benign intent can control a constitutional inquiry ... would be tantamount to ceding our constitutional duty, and our independence, to the legislative branch.”

I. First Clause of Section 27—Individual Environmental Rights

According to the plain language of Section 27, the provision establishes two separate rights in the people of the Commonwealth. The first—in the initial, prohibitory clause of Section 27—is the declared “right” of citizens to clean air and pure water, and to the preservation of natural, scenic, historic and esthetic values of the environment.³⁹ This clause affirms a limitation on the state’s power to act contrary to this right. While the subject of the right certainly may be regulated by the Commonwealth, any regulation is “subordinate to the enjoyment of the right ... [and] must be regulation purely, not destruction”; laws of the Commonwealth that unreasonably impair the right are unconstitutional.

The terms “clean air” and “pure water” leave no doubt as to the importance of these specific qualities of the environment for the proponents of the constitutional amendment and for the ratifying voters. Moreover, the constitutional provision directs the “preservation” of broadly defined values of the environment, a construct that necessarily emphasizes the importance of each value separately, but also implicates a holistic analytical approach to ensure both the protection from harm or damage and to ensure the maintenance and perpetuation of an environment of quality for the benefit of future generations.

Although the first clause of Section 27 does not impose express duties on the political branches to enact specific affirmative measures to promote clean air, pure water, and the preservation of the different values of our environment, the right articulated is neither meaningless nor merely aspirational. The corollary of the people’s Section 27 reservation of right to an environment of quality is an obligation on the government’s behalf to refrain from unduly infringing upon or violating the right, including by legislative enactment or executive action. Clause one of Section 27 requires each branch of government to consider in advance of proceeding the environmental effect of any proposed action on the constitutionally protected features. The failure to obtain information regarding environmental effects does not excuse the constitutional obligation because the obligation exists *a priori* to any statute purporting to create a cause of action.

Moreover, as the citizens argue, the constitutional obligation binds all government, state or local, concurrently.

Also apparent from the language of the constitutional provision are the substantive standards by which we decide a claim for violation of a right protected by the first clause of Section 27. The right to “clean air” and “pure water” sets plain conditions by which government must abide. We recognize that, as a practical matter, air and water quality have relative rather than absolute attributes. Furthermore, state and federal laws and regulations both govern “clean air” and “pure water” standards and,

as with any other technical standards, the courts generally defer to agency expertise in making a factual determination whether the benchmarks were met. *Accord* 35 P.S. § 6026.102(4) (recognizing that General Assembly “has a duty” to implement Section 27 and devise environmental remediation standards). That is not to say, however, that courts can play no role in enforcing the substantive requirements articulated by the Environmental Rights Amendment in the context of an appropriate challenge. Courts are equipped and obliged to weigh parties’ competing evidence and arguments, and to issue reasoned decisions regarding constitutional compliance by the other branches of government. The benchmark for decision is the express purpose of the Environmental Rights Amendment to be a bulwark against actual or likely degradation of, *inter alia*, our air and water quality.

Section 27 also separately requires the preservation of “natural, scenic, historic and esthetic values of the environment.” PA. CONST. art. I, § 27. By calling for the “preservation” of these broad environmental values, the Constitution again protects the people from governmental action that unreasonably causes actual or likely deterioration of these features. The Environmental Rights Amendment does not call for a stagnant landscape; nor, as we explain below, for the derailment of economic or social development; nor for a sacrifice of other fundamental values. But, when government acts, the action must, on balance, reasonably account for the environmental features of the affected locale, as further explained in this decision, if it is to pass constitutional muster.

The right delineated in the first clause of Section 27 presumptively is on par with, and enforceable to the same extent as, any other right reserved to the people in Article I. See PA. CONST. art. I, § 25 (“everything” in Article I is excepted from government’s general powers and is to remain inviolate); *accord* 1970 Pa. Legislative Journal–House at 2272 (“If we are to save our natural environment we must therefore give it the same Constitutional protection we give to our political environment.”); This parity between constitutional provisions may serve to limit the extent to which constitutional environmental rights may be asserted against the government if such rights are perceived as potentially competing with, for example, property rights as guaranteed in Sections 1, 9, and 10. PA. CONST. art. I, §§ 1, 9, 10, 27.

Relatedly, while economic interests of the people are not a specific subject of the Pennsylvania Declaration of Rights, we recognize that development promoting the economic well-being of the citizenry obviously is a legitimate state interest. In this respect, and relevant here, it is important to note that we do not perceive Section 27 as expressing the intent of either the unanimous legislative sponsors or the ratifying voters to deprive persons of the use of their property or to derail development leading to an increase in the general welfare, convenience, and prosperity of the people. But, to achieve recognition of the environmental rights enumerated in the first clause of Section 27 as “inviolable” necessarily implies that economic development cannot take place at the expense of an unreasonable degradation of the environment. As respects the environment, the state’s plenary police power, which serves to promote said welfare, convenience, and prosperity, must be exercised in a manner that promotes sustainable property use and economic development.

II. *The Second and Third Clauses of Section 27—The Public Trust*

The second right reserved by Section 27 is the common ownership of the people, including future generations, of Pennsylvania's public natural resources. On its terms, the second clause of Section 27 applies to a narrower category of "public" natural resources than the first clause of the provision. The drafters, however, left unqualified the phrase public natural resources, suggesting that the term fairly implicates relatively broad aspects of the environment, and is amenable to change over time to conform, for example, with the development of related legal and societal concerns. *Accord* 1970 Pa. Legislative Journal—House at 2274. At present, the concept of public natural resources includes not only state-owned lands, waterways, and mineral reserves, but also resources that implicate the public interest, such as ambient air, surface and ground water, wild flora, and fauna (including fish) that are outside the scope of purely private property.

The legislative history of the amendment supports this plain interpretation. In its original draft, the second clause of the proposed Environmental Rights Amendment included an enumeration of the public natural resources to be protected. The resources named were "the air, waters, fish, wildlife, and the public lands and property of the Commonwealth..." But, after members of the General Assembly expressed disquietude that the enumeration of resources would be interpreted "to limit, rather than expand, [the] basic concept" of public natural resources, Section 27 was amended and subsequently adopted in its existing, unrestricted, form. The drafters seemingly signaled an intent that the concept of public natural resources would be flexible to capture the full array of resources implicating the public interest, as these may be defined by statute or at common law.

The third clause of Section 27 establishes the Commonwealth's duties with respect to Pennsylvania's commonly-owned public natural resources, which are both negative (*i.e.*, prohibitory) and affirmative (*i.e.*, implicating enactment of legislation and regulations). The provision establishes the public trust doctrine with respect to these natural resources (the corpus of the trust), and designates "the Commonwealth" as trustee and the people as the named beneficiaries. *Payne*, 361 A.2d at 272. The terms of the trust are construed according to the intent of the settlor which, in this instance, is "the people."

"Trust" and "trustee" are terms of art that carried legal implications well developed at Pennsylvania law at the time the amendment was adopted. ... The statement offered in the General Assembly in support of the amendment explained the distinction between the roles of proprietor and trustee in these terms:

Under the proprietary theory, government deals at arms['] length with its citizens, measuring its gains by the balance sheet profits and appreciation it realizes from its resources operations. Under the trust theory, it deals with its citizens as a fiduciary, measuring its successes by the benefits it bestows upon all its citizens in their utilization of natural resources under law.

It is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust."'). The trust relationship does not contemplate a settlor placing blind faith in the uncontrolled discretion of a trustee; the settlor is entitled to maintain some control and flexibility, exercised by granting the trustee considerable discretion to accomplish the purposes of the trust. An exposition here is not necessary on all the ramifications that the term trustee may have in the context of Section 27. As in our discussion of the Environmental Rights Amendment generally, we merely outline foundational principles relevant to our disposition of this matter.

This environmental public trust was created by the people of Pennsylvania, as the common owners of the Commonwealth's public natural resources; this concept is consistent with the ratification process of the constitutional amendment delineating the terms of the trust. The Commonwealth is named trustee and, notably, duties and powers attendant to the trust are not vested exclusively in any single branch of Pennsylvania's government. The plain intent of the provision is to permit the checks and balances of government to operate in their usual fashion for the benefit of the people in order to accomplish the purposes of the trust. This includes local government.

As trustee, the Commonwealth is a fiduciary obligated to comply with the terms of the trust and with standards governing a fiduciary's conduct. The explicit terms of the trust require the government to "conserve and maintain" the corpus of the trust. See PA. CONST. art. I, § 27. The plain meaning of the terms conserve and maintain implicates a duty to prevent and remedy the degradation, diminution, or depletion of our public natural resources. As a fiduciary, the Commonwealth has a duty to act toward the corpus of the trust—the public natural resources—with prudence, loyalty, and impartiality.

As the parties here illustrate, two separate Commonwealth obligations are implicit in the nature of the trustee-beneficiary relationship. The first obligation arises from the prohibitory nature of the constitutional clause creating the trust, and is similar to other negative rights articulated in the Declaration of Rights. Stated otherwise, the Commonwealth has an obligation to refrain from performing its trustee duties respecting the environment unreasonably, including via legislative enactments or executive action. As trustee, the Commonwealth has a duty to refrain from permitting or encouraging the degradation, diminution, or depletion of public natural resources, whether such degradation, diminution, or depletion would occur through direct state action or indirectly, e.g., because of the state's failure to restrain the actions of private parties. In this sense, the third clause of the Environmental Rights Amendment is complete because it establishes broad but concrete substantive parameters within which the Commonwealth may act. *Compare* PA. CONST. art. I, § 27 *with*, e.g., PA. CONST. art. I, § 28. This Court perceives no impediment to citizen beneficiaries enforcing the constitutional prohibition in accordance with established principles of judicial review....

The second obligation peculiar to the trustee is, as the Commonwealth recognizes, to act affirmatively to protect the environment, via legislative action. The General Assembly has not shied from this duty; it has enacted environmental statutes, most notably the Clean Streams Act, see 35 P.S. § 691.1 *et seq.*; the Air Pollution Control Act, see 35 P.S. § 4001 *et seq.*; and the Solid Waste Management Act, see 35 P.S. § 6018.101 *et seq.* As these statutes (and related regulations) illustrate, legislative enactments serve to define regulatory powers and duties, to describe prohibited conduct of private individuals and entities, to provide procedural safeguards, and to enunciate technical standards of environmental protection. These administrative details are appropriately addressed by legislation because, like other “great ordinances” in our Declaration of Rights, the generalized terms comprising the Environmental Rights Amendment do not articulate them. The call for complementary legislation, however, does not override the otherwise plain conferral of rights upon the people.

Of course, the trust’s express directions to conserve and maintain public natural resources do not require a freeze of the existing public natural resource stock; rather, as with the rights affirmed by the first clause of Section 27, the duties to conserve and maintain are tempered by legitimate development tending to improve upon the lot of Pennsylvania’s citizenry, with the evident goal of promoting sustainable development.

Within the public trust paradigm of Section 27, the beneficiaries of the trust are “all the people” of Pennsylvania, including generations yet to come. The trust’s beneficiary designation has two obvious implications: first, the trustee has an obligation to deal impartially with all beneficiaries and, second, the trustee has an obligation to balance the interests of present and future beneficiaries. Moreover, this aspect of Section 27 recognizes the practical reality that environmental changes, whether positive or negative, have the potential to be incremental, have a compounding effect, and develop over generations. The Environmental Rights Amendment offers protection equally against actions with immediate severe impact on public natural resources and against actions with minimal or insignificant present consequences that are actually or likely to have significant or irreversible effects in the short or long term.

Section 27 is explicit regarding the respective rights of the people and obligations of the Commonwealth, and considerations upon which we typically rely in statutory construction confirm our development of the basic principles enunciated by its drafters. Among the relevant considerations are the occasion and necessity for the constitutional provision, the legislative history and circumstances of enactment and ratification, the mischief to be remedied and the object to be attained.

That Pennsylvania deliberately chose a course different from virtually all of its sister states speaks to the Commonwealth’s experience of having the benefit of vast natural resources whose virtually unrestrained exploitation, while initially a boon to investors, industry, and citizens, led to destructive and lasting consequences not only for the environment but also for the citizens’ quality of life. Later generations paid

and continue to pay a tribute to early uncontrolled and unsustainable development financially, in health and quality of life consequences, and with the relegation to history books of valuable natural and esthetic aspects of our environmental inheritance. The drafters and the citizens of the Commonwealth who ratified the Environmental Rights Amendment, aware of this history, articulated the people's rights and the government's duties to the people in broad and flexible terms that would permit not only reactive but also anticipatory protection of the environment for the benefit of current and future generations. Moreover, public trustee duties were delegated concomitantly to all branches and levels of government in recognition that the quality of the environment is a task with both local and statewide implications, and to ensure that all government neither infringed upon the people's rights nor failed to act for the benefit of the people in this area crucial to the well-being of all Pennsylvanians.

C. Article I, Section 27 Rights in Application

We underscore that the citizens raise claims which implicate primarily the Commonwealth's duties as trustee under the Environmental Rights Amendment. The Commonwealth's position on the municipalities' role following Act 13's land use revolution respecting oil and gas operations is similar to its stance regarding the authority of the judiciary to entertain and decide this dispute: in the Commonwealth's view, there is no role. According to the Commonwealth, the question here is strictly one of policy, which only the General Assembly may formulate pursuant to its police powers and authority as trustee of Pennsylvania's public natural resources. By the Commonwealth's reasoning, municipalities have no authority to articulate or implement a different policy, and they have no authority even to claim that the General Assembly's policy violates the Commonwealth's organic charter. The Commonwealth suggests that Act 13 is an enactment based on valid legislative objectives and, therefore, falls properly within its exclusive discretionary policy judgment.

In contrast, the citizens construe the Environmental Rights Amendment as protecting individual rights and devolving duties upon various actors within the political system; and they claim that breaches of those duties or encroachments upon those rights is, at a minimum, actionable. According to the citizens, this dispute is not about municipal power, statutory or otherwise, to develop local policy, but it is instead about compliance with constitutional duties. Unless the Declaration of Rights is to have no meaning, the citizens are correct.

In relevant part, as we have explained previously, the Environmental Rights Amendment to the Pennsylvania Constitution delineates limitations on the Commonwealth's power to act as trustee of the public natural resources. It is worth reiterating that, insofar as the Amendment's prohibitory trustee language is concerned, the constitutional provision speaks on behalf of the people, to the people directly, rather than through the filter of the people's elected representatives to the General Assembly.

The Commonwealth's obligations as trustee to conserve and maintain the public natural resources for the benefit of the people, including generations yet to come, create a right in the people to seek to enforce the obligations.

We recognize that, along with articulating the people's rights as beneficiaries of the public trust, the Environmental Rights Amendment also encourages the General Assembly to exercise its trustee powers to enact environmental legislation that serves the purposes of the trust. But, in this litigation, the citizens' constitutional challenge is not to the General Assembly's power to enact such legislation; that is a power the General Assembly unquestionably possesses. The question arising from the Commonwealth's litigation stance is whether the General Assembly can perform the legislative function in a manner inconsistent with the constitutional mandate.

Act 13 is not generalized environmental legislation, but is instead a statute that regulates a single, important industry—oil and gas extraction and development. Oil and gas resources are both privately owned and partly public, *i.e.*, insofar as they are on public lands. Act 13 does not remotely purport to regulate simply those oil and gas resources that are part of the public trust corpus, but rather, it addresses the exploitation of all oil and gas resources throughout Pennsylvania. Act 13's primary stated purpose is not to effectuate the constitutional obligation to protect and preserve Pennsylvania's natural environment. Rather, the purpose of the statute is to provide a maximally favorable environment for industry operators to exploit Pennsylvania's oil and natural gas resources, including those in the Marcellus Shale Formation. As the citizens illustrate, development of the natural gas industry in the Commonwealth unquestionably has and will have a lasting, and undeniably detrimental, impact on the quality of these core aspects of Pennsylvania's environment, which are part of the public trust.

As we have explained, Pennsylvania has a notable history of what appears retrospectively to have been a shortsighted exploitation of its bounteous environment, affecting its minerals, its water, its air, its flora and fauna, and its people. The lessons learned from that history led directly to the Environmental Rights Amendment, a measure which received overwhelming support from legislators and the voters alike. When coal was "King," there was no Environmental Rights Amendment to constrain exploitation of the resource, to protect the people and the environment, or to impose the sort of specific duty as trustee upon the Commonwealth as is found in the Amendment. Pennsylvania's very real and mixed past is visible today to anyone travelling across Pennsylvania's spectacular, rolling, varied terrain. The forests may not be primordial, but they have returned and are beautiful nonetheless; the mountains and valleys remain; the riverways remain, too, not as pure as when William Penn first laid eyes upon his colonial charter, but cleaner and better than they were in a relatively recent past, when the citizenry was less attuned to the environmental effects of the exploitation of subsurface natural resources. But, the landscape bears visible scars, too, as reminders of the past efforts of man to exploit Pennsylvania's natural assets. Pennsylvania's past is the necessary prologue here: the reserved rights, and the concomitant duties and

constraints, embraced by the Environmental Rights Amendment, are a product of our unique history.

The type of constitutional challenge presented today is as unprecedented in Pennsylvania as is the legislation that engendered it. But, the challenge is in response to history seeming to repeat itself: an industry, offering the very real prospect of jobs and other important economic benefits, seeks to exploit a Pennsylvania resource, to supply an energy source much in demand. The political branches have responded with a comprehensive scheme that accommodates the recovery of the resource. By any responsible account, the exploitation of the Marcellus Shale Formation will produce a detrimental effect on the environment, on the people, their children, and future generations, and potentially on the public purse, perhaps rivaling the environmental effects of coal extraction. The litigation response was not available in the nineteenth century, since there was no Environmental Rights Amendment. The response is available now.

The challenge here is premised upon that part of our organic charter that now explicitly guarantees the people's right to an environment of quality and the concomitant expressed reservation of a right to benefit from the Commonwealth's duty of management of our public natural resources. The challengers here are citizens—just like the citizenry that reserved the right in our charter. They are residents or members of local legislative and executive bodies, and several localities directly affected by natural gas development and extraction in the Marcellus Shale Formation. Contrary to the Commonwealth's characterization of the dispute, the citizens seek not to expand the authority of local government but to vindicate fundamental constitutional rights that, they say, have been compromised by a legislative determination that violates a public trust. The Commonwealth's efforts to minimize the import of this litigation by suggesting it is simply a dispute over public policy voiced by a disappointed minority requires a blindness to the reality here and to Pennsylvania history, including Pennsylvania constitutional history; and, the position ignores the reality that Act 13 has the potential to affect the reserved rights of every citizen of this Commonwealth now, and in the future. We will proceed now to the merits.

VI. Conclusion and Mandate

For these reasons, the Commonwealth Court's decision is affirmed in part and reversed in part. We hold that:

C. Sections 3215(b)(4), 3215(d), 3303, and 3304 violate the Environmental Rights Amendment. We do not reach other constitutional issues raised by the parties with respect to these provisions. As a result, the Commonwealth Court's decision is affirmed with respect to Sections 3215(b)(4) and 3304 (on different grounds), and reversed with respect to Sections 3215(d) and 3303. Accordingly, application and enforcement of Sections 3215(b)(4), 3215(d), 3303, and 3304 is hereby enjoined.

E. The Commonwealth Court erred in sustaining the Commonwealth's preliminary objections to Counts IV and V of the citizens' petition for review. The lower court's decision in these respects is reversed and the citizens' claims are remanded for decision on the merits.

Jurisdiction relinquished.

[Concurring and dissenting opinions omitted.]



Chapter 2: A Taxonomy of Environmental Constitutionalism

Such a right belongs to a different category of rights altogether for it concerns nothing less than self-preservation and self-perpetuation . . . the advancement of which may even be said to predate all governments and constitutions. As a matter of fact, these basic rights need not even be written in the Constitution for they are assumed to exist from the inception of humankind.

Minors Oposa v. Factoran Jr. (Sup. Ct. of the Philippines, 1994)

Since Stockholm, dozens of countries have adopted provisions addressing environmental matters in some way, sometimes spectacularly. In what has been called an environmental rights 'revolution,' the constitutions of about three-quarters of nations worldwide – inhabited by the majority of the planet's inhabitants – address environmental matters in some fashion. Approximately 150 of the world's 193 UN members have constitutions from about 90 nations that expressly or implicitly recognize some kind of fundamental right to a quality environment, a similar number that impose corresponding duties on individuals or the state to protect the environment, dozens that impart environmental protection as a matter of

national policy, three dozen that establish procedural rights in environmental matters, dozens of others recognize specific rights concerning water, sustainability, nature, public trust and climate change. And that about two-thirds (126) of the constitutions in force address natural resources in some fashion, including water (63), land (62), fauna (59), minerals and mining (45), flora (42), biodiversity or ecosystem services (35), soil/sub-soil (34), air (28), nature (27), energy (22), and other (17). Some countries have constitutions that do many if not most of these things, while others do none of them. Most fall somewhere in between.

The constitution of South Africa provides an example of environmental constitutionalism that incorporates individual and collective rights to a quality environment for present and future generations. It reads:

Everyone has the right[:]

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

Other countries following similarly sophisticated approaches include Dominican Republic (“Every person has the right, both individually and collectively, to the sustainable use and enjoyment of the natural resources; to live in a healthy, ecologically balanced [equilibrado] and suitable environment for the development and preservation of the various forms of life, of the landscape and of nature”), East Timor (“All have the right to a humane, healthy, and ecologically balanced environment and the duty to protect it and improve it for the benefit of the future generations”), Kenya (“Every person has the right to a clean and healthy environment, which includes the right—(a) to have the environment protected for the benefit of present and future generations through legislative and other measures ...; and (b) to have obligations relating to the environment fulfilled”), and South Sudan (“Every person shall have the right to have the environment protected for the benefit of present and future generations, through appropriate legislative action and other measures that: (a) prevent pollution and ecological degradation; (b) promote conservation; and (c) secure ecologically sustainable development and use of natural resources while promoting rational economic and social development so as to protect genetic stability and bio-diversity”).

Environmental constitutionalism is also in play with constitutions under consideration in the aftermath of the Arab spring. For example, Egypt’s draft constitution provides that: “Every person has the right to a healthy, undamaged environment. The state commits itself to the inviolability of the environment and its

protection against pollution. It also commits itself to using natural resources in a way that will not harm the environment and to preserving the rights of all generations to it." Even the constitutions of countries in waiting advert to the environment: Palestine's draft constitution commits the country to "striv[ing] to achieve a clean, balanced environment." And Scotland's government, arguing for a change in status to a constitutional monarchy has argued that "a constitutional convention should examine how principles on climate change, the environment and the sustainable use of Scotland's natural resources should be constitutionally protected to embed Scotland's commitment to sustainable development and responsible and sustained economic growth" and believes further that " a written constitution should include a constitutional ban on nuclear weapons being based in Scotland."

This chapter focuses on the primary substantive and procedural strains of environmental constitutionalism. It then reports briefly on other forms of environmental constitutionalism, including duties and obligations, water rights, rights of nature. It concludes with a brief survey of subnational environmental constitutionalism, highlighting developments in Brazil.

A. Substantive Rights

Fundamental environmental rights are those that recognize a right to some degree of environmental quality, such as a right to an 'adequate,' 'clean,' 'healthy,' 'productive,' 'harmonious,' or 'sustainable' environment. Moreover, environmental rights have been recognized as an exponent of non-environmental substantive rights, such as the right to life. The common adjectival denominator to substantive environmental rights is that they embody basic human rights to a quality environment.

There is good reason that substantive environmental rights are common. As a general matter, substantive rights also provide repose because they are often viewed as being self-executing and enforceable, are less susceptible to political change, and more likely to endure. Substantive environmental rights, therefore, afford the most durable and enforceable means for environmental protection.

Despite the relative commendations of substantive environmental rights, few countries had even considered amending or adopting constitutions to recognize an express substantive right to a quality environment prior to Stockholm in 1972. Yet since then, provisions that recognize some sort of substantive right to a quality environment run the gamut from spare to spectacular and much in between. Straightforward provisions are reflected in the constitutions of Benin ("Every person has the right to a healthy, satisfactory and sustainable environment and has the duty to defend it"), Chile ("All have ... The right to live in an environment free from contamination"), Colombia ("Every individual has the right to enjoy a healthy environment"), Costa Rica ("Every person has the right to a healthy and ecologically balanced environment"), Montenegro ("Everyone shall have the right to a sound environment"), Mozambique ("All citizens shall have the right to live in . . . a balanced natural environment"), Paraguay ("Everyone has the right to live in a healthy, ecologically balanced environment"), Spain ("Everyone has the right to enjoy an environment suitable for the development of the person"), Turkey ("Everyone has the

right to live in a healthy, balanced environment”), and Venezuela (“Every person has a right to individually and collectively enjoy a life and a safe, healthy and ecologically balanced environment”).

Provisions in some countries are very specific, recognizing environmental constitutionalism for a select cohort. For example, countries that reserve substantive environmental rights for residents, women, children, indigenous populations, or future generations include Argentina (“All residents enjoy the right to a healthy, balanced environment which is fit for human development and by which productive activities satisfy current necessities without compromising those of future generations”), El Salvador (“Every child has the right to live in familial and environmental conditions that permit his integral development, for which he shall have the protection of the State”), and Madagascar (“The Fokonolona can take the appropriate measures tending to oppose acts susceptible to destroy their environment, dispossess them of their land, claim the traditional spaces allocated to their herds of cattle or claim their ceremonial heritage, unless these measures may undermine the general interest or public order”).

Some countries connect substantive environmental rights to other national norms or rights. For example, countries that combine substantive rights to national norms such as sustainable development or cultural advancement include Bolivia (“Everyone has the right to a healthy, protected, and balanced environment. The exercise of this right must be granted to individuals and collectives of present and future generations, as well as to other living things, so they may develop in a normal and permanent way”), Ecuador (“The right of the population to live in a healthy and ecologically balanced environment that guarantees sustainability and the good way of living (sumak kawsay), is recognized”), Georgia (“Everyone shall have the right to live in a healthy environment and enjoy natural and cultural surroundings”), and Greece (“The protection of the natural and cultural environment constitutes ... a right of every person”). Moreover, some constitutions connect environmental to other constitutionally protected human rights, such as rights to dignity, health, life, or shelter. Countries to have done so include Afghanistan (“ensuring a prosperous life and a sound environment for all those residing in this land”), Belgium (“Everyone has the right to lead a life worthy of human dignity . . . [including] the right to enjoy the protection of a healthy environment”), Brazil (“All persons are entitled to an ecologically balanced environment, which is an asset for the people’s common use and is essential to a healthy life”), Guinea-Bissau (“The object of public health shall be to . . . encourage [the people’s] balanced integration into the social ecological sphere in which they live”), Moldova (“Every person (*om*) has the right to an environment that is ecologically safe for life and health”), Sao Tomé & Príncipe (“All have the right to housing and to an environment of human life”), and Norway (“Every person has a right to an environment that is conducive to health and to natural surroundings whose productivity and diversity are preserved.”).

Other constitutions place environmental rights near separate but related rights, such as a right to health. These include Croatia (“Everyone shall have the right to a healthy life”), Guatemala (“The right to health is a fundamental right of the human being

without any discrimination”), and Honduras (“The right to the protection of one’s health is hereby recognized”). Such co-constitutionalism has a synergistic effect, fortifying substantive environmental rights.

Substantive environmental rights have also found their way into some countries that have not as yet adopted an express right to a quality environment. Constitutional and apex courts in some countries have derived substantive environmental rights from other constitutional guarantees, such as a right to life. Courts in India have most commonly enlisted a “right to life” as implying rights to a quality environment, as well as other socioeconomic rights.

B. Procedural Environmental Rights

A constitutional guarantee to a beneficial environment is more likely to take root when stakeholders have the right to receive free and timely information for, participate in deliberations about, and appeal to government agencies granting permission to, for example, dam a wild river, emit mercury-laden air pollutants near an elementary school, clearcut a forest that provides habitat for endangered megafauna, or inexorably alter scenic landscape. Approximately three dozen countries in the last thirty years have constitutionalized procedural rights in environmental matters as a means of complementing or supplementing other constitutional, legislative, and regulatory norms.

Procedural rights classically consist of three ‘pillars,’ allowing for rights to information, participation and access to justice. These pillars work in tandem to help ensure better decisionmaking in environmental matters. First, informational rights include access to timely and reliable information from governmental agencies charged with overseeing activities that affect the environment. Second, participatory rights are those that enable stakeholders to shape governmental decisions in environmental matters, including permission to submit comments, ask questions, and attend public meetings. Third, adjudicatory rights are those that allow stakeholders to seek civil mediation and enforce court orders in the face of recalcitrant or improvident government action in environmental matters. Collectively, such process rights can raise awareness, provide opportunities to participate, foster empowerment, strengthen local communities, facilitate government accountability, increase public acceptance of decisions, and contribute to the legitimacy of governmental action. Procedural rights can also promote discourse and democratization through concomitant rights to assemble, speak and participate in governance.

Most of these constitutional procedural environmental rights provisions seem to be designed to help implement substantive environmental rights. Most countries that guarantee procedural environmental rights constitutionally contain a companion provision that guarantees a substantive right to a quality environment. This suggests that procedural environmental rights in those countries are designed to complement substantive environmental rights. Brazil’s constitution, for instance, protects the substantive right “to an ecologically balanced environment” but also imposes obligations on the government to “ensure the effectiveness of this right,” including

the obligation to demand and make public environmental impact studies. The French constitutional bloc incorporates the 2004 Charter of the Environment, which guarantees that “every person has the right, under conditions and limits defined by law, to access information relative to the environment that is held by government authorities and to participate in the development of public decisions having an impact on the environment.”

C. Other Aspects of Environmental Constitutionalism

1. Environmental Obligations, Duties and Policies

Almost one-half of national constitutions impose an individual duty to protect or defend the environment. Constitutional and apex courts have so far failed to engage these sorts of provisions.

Several constitutions expressly advance environmental policy or impose duties upon the state or state actors. Policy directives are intended to influence governmental decision-making but are generally not judicially enforceable. For example, Uruguay’s constitution contains a policy directive that “[t]he protection of the environment is of common interest.” The Constitution of Qatar provides that “[t]he State endeavors to protect the environment and its natural balance, to achieve comprehensive and sustainable development for all generations.” Such constitutional policy directives can be instrumental in establishing environmental norms that loomed large, for example, in saving Greece’s famed Acheloos River from being dammed beyond recognition.

Some constitutions allow the government to elevate environmental values over others. Some allow the government to restrict private property rights in favor of environmental policies. Others elevate environmental values over some or all other rights in favor of the environment: Chile’s constitution establishes that “The law can establish specific restrictions on the exercise of certain rights or freedoms in order to protect the environment.”

Most constitutions link environmental duties and rights, suggesting a symbiotic relationship between the two.

2. Rights to Water

The term “water” or “waters” appears in the constitutions of almost half the countries of the world, cumulatively more than 300 times. While most of these references are concerned with governmental authority to control and allocate water resources, about 30 constitutions provide for a human right to water or an environmental right to clean water. Some constitutional provisions guarantee a right to a quantity of water for drinking or irrigation, for example. Generally, these provisions can be thought of as providing a human right to water. Other provisions are qualitative, for instance guaranteeing rights to unpolluted water.

In general, these provisions track the twin paths for managing water resources at the international level. The principles developed through these regional and international systems to protect water resources as both a human and environmental right are often seamlessly and implicitly integrated into domestic constitutional law. Still, constitutional water cases tend to rely less on international law than other constitutional environmental cases simply because the international body of law relating to the human and environmental rights to water is less developed than it is for environmental rights generally.

3. Rights of Nature

Environmental constitutionalism addressing nature appears as either governmental duties or substantive rights of nature. First, the constitutions of some countries require all branches of government to protect nature. Germany's constitution, for instance, requires the government to protect "the natural bases of life and the animals within the framework of the constitutional order by legislation, and in accordance with law and justice, by executive and judicial power."

Second, biocentric environmental constitutionalism—recognizing the *right of nature*—has been pushed most emphatically so far by a couple of countries in South America. In 2008, Ecuador amended its constitution to recognize the right of nature, providing that: "Nature, or Pachamama, where life is reproduced and created, has the right to integral respect for her existence, her maintenance, and for the regeneration of her vital cycles, structure, functions, and evolutionary processes." In a nine-paragraph chapter devoted exclusively to the rights of nature, the Ecuadorian constitution invites implementation of the provision by empowering each "person, community, people, or nationality" to exercise public authority to enforce the right, according to normal constitutional processes. Bolivia has a framework law recognizing the rights of nature, and discussions of constitutional reforms to recognize them have taken place in Turkey.

4. Sustainability and Public Trust

Environmental sustainability promotes the idea that present lives in being should consume natural resources at a rate and in a way so as to preserve comparable opportunities for future generations; in other words, the Native American proverb that "We do not inherit the Earth from our ancestors: we borrow it from our children."

'Sustainability' has witnessed an astonishing pattern of development. Since the concept was first promoted as a single-sentence principle of international law at the Stockholm Conference in 1972, it is now a common if not ubiquitous feature in legal expressions at the international, national and subnational levels, culminating in 17 Sustainable Development Goals the United Nations (UN) established in 2015, to be achieved by 2030.

Sustainability has also infiltrated constitutionalism around the globe. Presently, more than three-dozen countries incorporate sustainability in their constitutions by advancing 'sustainable development,' the interests of 'future generations,' or some combination of these themes. These include Belgium ("pursue the objectives of sustainable development in its social, economic and environmental aspects") and

the Dominican Republic (“nonrenewable natural resources, can only be explored and exploited by individuals, under sustainable environmental criteria . . .” and provides for the protection of the environment “for the benefit of the present and future generations ...”). These constitutional provisions help bridge the gap left by international and domestic laws, even given the array of sustainability provisions already in existence.

Related to the modern notion of sustainability, the public trust doctrine derives from the ancient notion that the sovereign holds certain natural resources and objects of nature in trust for the benefit of current and future generations. The doctrine is “rooted in the precept that some resources are so central to the well-being of the community that they must be protected by distinctive, judge-made principles.”

5. Climate Change

Climate change is perhaps the most complex and important environmental challenges of our day. Climate change is at least somewhat attributable to anthropogenic greenhouse gas (GHG) emissions from the use and combustion of fossil fuels. Thus far, however, very few countries have seen fit to address climate change constitutionally. The Dominican Republic’s constitution is explicit on the point, with a provision under “The Organization of the Territory” that provides for a “plan of territorial ordering that assures the efficient and sustainable use of the natural resources of the Nation, in accordance with the need of adaptation to climate change . . .” Tunisia constitution also addresses climate change. Even with recent advances in international protection against climate change, one might expect to see more countries elect to entrench express constitutional measures, perhaps to track national intended contributions.

Although climate change is, of course, a global issue requiring concerted and coordinated global efforts adjunct to mitigation, adaptation, and compensation, its effects are absorbed locally by nations in response to sea level rise, loss of shoreline, drought, severe weather, and other consequences often attributed to climate change. These local effects are where environmental constitutionalism might play an important if limited role. Constitutions can direct governments to enact and implement policies to address the effects of climate change in ways not accomplished through existing international and national laws or that track international law or the nationally intended contributions that have been incorporated into the Paris Agreement of 2015 and the Marrakech Accord of 2016. Once absorbed into constitutional texts, courts can impel action by enforcing these provisions even through progressive realization.

6. Dignity

As constitutional courts are increasingly turning their attention to environmental rights cases, they are recognizing the deeply enmeshed relationships between a healthy environment and the enjoyment of other human rights. Only Belgium’s constitution so far makes this explicit, but courts around the world are beginning to acknowledge the connection. In particular, as the parallel jurisprudence of dignity is developing in constitutional tribunals throughout the world -- not as a stand-in for all

other human rights, but in order to protect the essence of human dignity, *as such* –, the tight link between the full development of one's personality, one's ability to live a decent life, and one's inclusion and participation one's affective, social, cultural, and political communities – all interests and values that are integral to the constitutional respect for human dignity – is becoming more evident to litigants and to jurists. The *La Oroya* case from Peru is a good example of the judicial attention to the imbrications of dignity and environmental protection, and of a national commitment to advancing both in tandem.

D. Subnational Environmental Constitutionalism

Standards in environmental constitutionalism can emanate from subnational sources, including states, provinces, municipalities and additional meso-levels of governance that exists between the national and local governments. Subnational governments around the globe have constitutionalized substantive and procedural environmental rights, environmental duties, and sustainable development for present and future generations, sometimes more elaborately than provided in national constitutions.

The Brazilian brand of subnational environmental constitutionalism is especially striking. The constitutions for all of Brazil's 26 states—and the Federal District—promote environmental protection, often in intricate ways. State constitutions delineate extensive governmental functions in the service of substantive environmental rights, including promoting biodiversity and sustainability, protecting species and water quality, advancing conservation and environmental education, and enforcing environmental requirements. The Mato Grosso constitution is typical, touching all corners of environmental constitutionalism by guaranteeing substantive and procedural rights and imposing duties and responsibilities that apply to all for the benefit of present and future generations.

Notably, the constitutions of most Brazilian states and the Federal District embed a substantive right to a quality environment in some form, most commonly to a “balanced” environment. For example, the constitution of the State of Acre provides that “[a]ll have the right to an ecologically balanced environment.” Amapá's provides that “All have the right to an ecologically balanced environment, which is an asset of common use and essential to a healthy quality of life.” Amazonas' says that “[a]ll have the right to a balanced environment, essential to a healthy quality of life.” Ceará's constitution refers to a “balanced environment” as an “inalienable right.” Goiás' constitution guarantees “an ecologically balanced environment.” Mato Grosso's says that: “All have the right to an ecologically balanced environment.” Maranhão's calls a balanced environment “an asset of common use and essential to people's quality of life, imposing to all, and especially the State and the Municipalities, the duty to ensure their preservation and restoration for the benefit of present generations and future.” Similar provisions recognizing a substantive right to a balanced environment are found in the constitutions of the States of Bahia, Espírito Santo, Goiás, Maranhão, Minas Gerais, Paraíba, Paraná, Piauí, Rio de Janeiro, Rio Grande do Sul, Rio Grande do Norte, Santa Catarina, Sergipe, and Tocantins, and in the Federal District. A couple of states vary slightly from the “balanced” formulae,

including Mato Grosso Sol, which provides that “All have the right to enjoy an environment free of physical and social factors harmful to health.”

The constitutions for most Brazilian states express environmental rights in terms of duties and responsibilities that are owed by all for the benefit of present and future generations. For example, Espírito Santo’s constitution reads: “All have the right to an ecologically, healthy and balanced environment, and it is incumbent upon them and in particular to the State and the Municipalities, to ensure its preservation, conservation and restoration for the benefit of present and future generations.” Likewise, Mato Grasso’s constitution imposes a duty on the state, municipalities, and “the community” “to defend and preserve” the environment “for present and future generations,” while Acre’s says that “both the State and the community shall defend [the environment] and preserve it for present and future generations,” and Amapá’s that “both the Government and the community shall have the duty to defend and preserve it for present and future generations.”

The constitutions of some Brazilian states specifically elevate the interests of nature. For example, Bahia’s says that “[i]t is incumbent upon the State, beyond all powers that are not prohibited by the Federal Constitution, to . . . protect the environment and fight pollution in any of its forms, preserving the forests, fauna and flora.” It remains to be seen whether provisions such as this create a “right” on behalf of nature.

Most Brazilian states similarly dictate governmental means for implementing substantive environmental rights, including the States of Amazonas, Bahia, Espírito Santo, Goiás, Maranhão, Mato Grosso do Sul, Minas Gerais, Paraíba, Paraná, Piauí, Rio de Janeiro, Rio Grande do Sul, Rio Grande do Norte, Santa Catarina, Sergipe, and Tocantins, and in the Federal District.

Subnational deployment of environmental rights in the United States is instructive because it underscores both the potential and the limitations of environmental constitutionalism. While all efforts to amend the U.S. Constitution to recognize environmental rights have failed, states in the United States have a long tradition of constitutionalizing environmental protection.

Presently, there are at least 207 natural resource or environment-related provisions in 46 state constitutions. These provisions reach 19 different categories of natural resources or the environment, including water, timber and minerals. They take 11 different forms, including general policy statements, legislative directives, and individual rights to a quality environment. States recognizing environmental protection as an overarching state policy include Louisiana, Michigan, Ohio, South Carolina, and Virginia. Several more address particular environmental concerns, such as access to water, preservation, re-development, sustainability, pollution abatement, climate change, energy reform, or environmental rights. Dozens more contain provisions fairly characterized as recognizing that the state holds state resources in “public trust.”

Currently, five states instantiate a substantive right to a quality environment: Hawaii, Illinois, Massachusetts, Montana, and Pennsylvania. These provisions are independent of state laws that allow citizens to enforce pollution control statutes.

While most of these five provide a “right” to the “environment,” the adjectival objective – “clean” or “healthful” or “quality” – differs from state to state. For example, Hawaii’s and Montana’s constitutions aim to afford a “clean and healthful environment,” Illinois’ “a right to a healthful environment,” Massachusetts’ a “right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment,” and Pennsylvania’s “a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment.”

E. Reference Materials

The decisions that follow place this taxonomy into context, including *Pablo Miguel Fabián Martínez Y Otros*, Sentencia Del Tribunal Constitucional de Peru (Peru, 2006), and *Domitila Rosario Piche Osorio, conocida por Domitila Rosario Piche Estrada, en contra del Ministro y de la Viceministra del Medio Ambiente y Recursos Naturales* (El Salvador, 2010). In two of the decisions that follow the courts engaged emerging issues in environmental constitutionalism, including climate change in *Ashgar Leghari v. Federation of Pakistan* (Lahore High Court, Pakistan, 2015), and human dignity in *Gbmere v. Royal Dutch Shell Gbmere* (finding that flaring natural gas as a byproduct of oil extraction is an actionable contravention of a right to dignity vertically (against the government) and horizontally (against the defendant)).

1. Pablo Miguel Fabián Martínez Y Otros (Peru, 2006)

Sentencia Del Tribunal Constitucional de Peru

En Lima, a los 12 días del mes de mayo del 2006, la Sala Segunda del Tribunal Constitucional, integrada por los magistrados Gonzales Ojeda, Bardelli Lartirigoyen y Vergara Gotelli, pronuncia la siguiente sentencia:...

FUNDAMENTOS

§1. Delimitación del petitorio

1. Los demandantes solicitan que el Ministerio de Salud y la Dirección General de Salud Ambiental (Digesa) cumplan los siguientes mandatos:
 - a) Diseñar e implementar una *estrategia de salud pública de emergencia* que tenga como objetivo la recuperación de la salud de los afectados por contaminantes en la ciudad de La Oroya; la protección de los grupos vulnerables; la adopción de medidas de prevención del daño a la salud y el levantamiento de informes sobre los riesgos a los cuales la población se encuentra expuesta, todo ello conforme a lo dispuesto por los artículos 96, 97, 98, 99, 103, 104, 105, 106 y 123 de la Ley General de Salud (26842).
 - b) Declarar en *Estado de Alerta* a la ciudad de La Oroya, lo cual implica la elaboración de un plan de estado de alerta de salud proponer los niveles de estado de alerta de la ciudad de La Oroya a la Presidencia del Consejo de Ministros y, precisamente, la declaración del estado de alerta, todo ello a tenor de los artículos 23 y 25 del Decreto Supremo 074-2001-PCM, Reglamento de Estándares Nacionales de Calidad Ambiental.
 - c) Establecer *programas de vigilancia epidemiológica y ambiental*, de conformidad con el artículo 15 del mencionado Decreto Supremo 074-2001-PCM.
2. En el presente caso, teniendo en cuenta que la pretensión de los demandantes en cuanto a la exigencia del cumplimiento de los mandatos contenidos en las referidas disposiciones legales y reglamentarias, no solo se relaciona con el control de la inacción administrativa sino, precisamente, con que tal inacción vulnera los derechos a la salud y a un medio ambiente equilibrado y adecuado, es preciso analizar, previamente, tales derechos, toda vez que detrás de la cuestionada inacción administrativa se encuentra la denuncia sobre la vulneración de los derechos fundamentales invocados.
3. Como se apreciará más adelante, lo antes expuesto supone que si bien los derechos a la salud y a un medio ambiente equilibrado y adecuado no podrían ser protegidos «directamente» mediante el proceso de cumplimiento, sí pueden ser tutelados de modo «indirecto», siempre y cuando exista un mandato claro,

concreto y vigente, dispuesto en una ley o un acto administrativo, que se encuentre indisolublemente ligado a la protección de tales derechos fundamentales.

§2. El cumplimiento de la Ley 26842 y del Decreto Supremo 074-2001-PCM, y la protección de la salud

a) Elementos básicos del Estado democrático y social de Derecho

4. El Tribunal Constitucional ha sostenido, en reiterada jurisprudencia, que el Estado peruano, definido por la Constitución de 1993, presenta las características que identifican a un Estado democrático y social de Derecho, tal como se desprende de una interpretación conjunta de los artículos 3 y 43 de la Norma Fundamental. Asimismo, se sustenta en los principios esenciales de libertad, seguridad, propiedad privada, soberanía popular, separación de las funciones supremas del Estado y reconocimiento de los derechos fundamentales.

5. Un Estado democrático y social de Derecho

(...) no obvia los principios y derechos básicos del Estado de Derecho, tales como la libertad, la seguridad, la propiedad privada y la igualdad ante la ley; antes bien, pretende conseguir su mayor efectividad, dotándolos de una base y un contenido material, a partir del supuesto de que individuo y sociedad no son categorías aisladas y contradictorias, sino dos términos en implicación recíproca. Así, no hay posibilidad de materializar la libertad si su establecimiento y garantías formales no van acompañados de unas condiciones existenciales mínimas que hagan posible su ejercicio real (...), lo que supone la existencia de un conjunto de principios que instrumentalicen las instituciones políticas, fundamenten el sistema jurídico estadual y sustenten sus funciones”.

6. Asimismo, el Tribunal Constitucional ha dejado sentado que la configuración del Estado democrático y social de Derecho requiere de dos aspectos básicos:

a) La existencia de condiciones materiales para alcanzar sus presupuestos, lo que exige una relación directa con las posibilidades reales y objetivas del Estado y con una participación activa de los ciudadanos en el quehacer estatal, y

b) La identificación del Estado con los fines de su contenido social, de forma tal que pueda evaluar, con criterio prudente, tanto los contextos que justifiquen su accionar como su abstención, evitando tornarse en obstáculo para el desarrollo social.

7. Precisamente, entre los fines de contenido social que identifican a este modelo de Estado se encuentran el *derecho a la salud*, el derecho al trabajo y el derecho a la educación, entre otros; por lo tanto, para lograr una mayor efectividad de tales derechos, tal como se ha mencionado en los parágrafos precedentes, el Estado

tiene tanto «obligaciones de hacer» (realizar acciones que tiendan al logro de un mayor disfrute del derecho) como «obligaciones de no hacer» (abstenerse de interferir en el ejercicio de los derechos), por lo que no resultan válidas aquellas posiciones que solo ven en los derechos civiles y políticos (libertad, seguridad y propiedad, entre otros) obligaciones estatales de “no hacer”, y en los derechos sociales (salud, trabajo, educación), solo obligaciones estatales de “hacer”.

8. En el Estado democrático y social de Derecho, la consecución de la mencionada participación activa de los ciudadanos en el sistema democrático, así como el logro del desarrollo social, requieren de una decidida labor del Estado expresada en «realizar acciones» que garanticen un efectivo disfrute de derechos tales como la libertad, seguridad, propiedad (por ejemplo, optimizando los servicios de seguridad, la función jurisdiccional o los registros de propiedad), *a la salud*, el trabajo y la educación (por ejemplo, mejorando los servicios de salud, creando más puestos de trabajo y eliminando el analfabetismo), entre otros; y en la «abstención» de afectar tales derechos (por ejemplo, no interferir irrazonable y desproporcionadamente en la libertad o propiedad, o no afectar o perjudicar los servicios educativos y de salud existentes).
9. Como lo ha sostenido el Tribunal Constitucional en el caso Meza García, al referirse a la efectividad de los derechos sociales

No se trata, sin embargo, de meras normas programáticas de *eficacia mediata*, como tradicionalmente se ha señalado para diferenciarlos de los denominados derechos civiles y políticos de *eficacia inmediata*, pues justamente su mínima satisfacción representa una garantía indispensable para el goce de los derechos civiles y políticos. De este modo, sin educación, salud y calidad de vida digna en general, mal podría hablarse de libertad e igualdad social, lo que hace que tanto el legislador como la administración de justicia deban pensar en el reconocimiento de los mismos en forma conjunta e interdependiente”.

10. Es más, en la actualidad, algunos de los derechos clásicamente considerados civiles y políticos han adquirido una indudable influencia social. Sobre el particular, se ha manifestado que “La pérdida del carácter absoluto del derecho de propiedad sobre la base de consideraciones sociales es el ejemplo más cabal al respecto, aunque no el único. Las actuales tendencias del derecho de daños asignan un lugar central a la distribución social de riesgos y beneficios como criterio para determinar la obligación de reparar. El impetuoso surgimiento de un derecho del consumo ha transformado sustancialmente los vínculos contractuales cuando participan de la relación consumidores y usuarios. La consideración tradicional de la libertad de expresión y prensa ha adquirido dimensiones sociales que cobran cuerpo a través de la formulación de la libertad de información como derecho de todo miembro de la sociedad (...)”.

11. Por tanto, en un Estado democrático y social de Derecho, los derechos sociales (como el derecho a la salud) se constituyen como una ampliación de los derechos civiles y políticos, y tienen por finalidad, al igual que ellos, erigirse en garantías para el individuo y para la sociedad, de manera tal que se pueda lograr el respeto de la dignidad humana, una efectiva participación ciudadana en el sistema democrático y el desarrollo de todos los sectores que conforman la sociedad, en especial de aquellos que carecen de las condiciones físicas, materiales o de otra índole que les impiden un efectivo disfrute de sus derechos fundamentales.

b) La exigibilidad de derechos sociales como el derecho a la salud

12. El Tribunal Constitucional ha subrayado en anterior oportunidad que

Aunque la dignidad de la persona es el presupuesto ontológico común a todos los derechos fundamentales, no menos cierto es que entre ellos es posible establecer diferencias de distinto orden. La heterogeneidad que presentan los derechos fundamentales entre sí, no sólo reposa en cuestiones teóricas de carácter histórico, sino que estas disimilitudes, a su vez, pueden revestir significativas repercusiones prácticas". Determinados derechos "forman parte de aquellos derechos fundamentales sociales de preceptividad diferida, prestacionales, o también denominados progresivos o programáticos"^[5].

13. Sin lugar a dudas, esta preceptividad diferida no implica en modo alguno el desconocimiento de la condición de derechos fundamentales que ostentan los derechos sociales, o que el reconocimiento de estos como derechos fundamentales vaya a depender de su nivel de exigibilidad (que cuenten con mecanismos jurisdiccionales para su protección). Como se verá más adelante, los derechos sociales son derechos fundamentales por su relación e identificación con la dignidad de la persona y porque así se encuentran consagrados en nuestra Constitución. Es más, la Norma Fundamental establece, en su artículo 3, que

La enumeración de los derechos establecidos en este capítulo no excluye los demás que la Constitución garantiza, ni otros de naturaleza análoga o que se fundan en la dignidad del hombre, o en los principios de soberanía del pueblo del Estado democrático de derecho y de la forma republicana de gobierno".

14. La exigibilidad, entonces, se constituye en una categoría vinculada a la efectividad de los derechos fundamentales, pero no determina si un derecho es fundamental o no. Por ello,

(...) en el Estado social y democrático de derecho, la *ratio fundamentalis* no puede ser privativa de los denominados derechos de defensa, es decir, de aquellos derechos cuya plena vigencia se encuentra, en

principio, garantizada con una conducta estatal abstencionista, sino que es compartida también por los derechos de prestación que reclaman del Estado una intervención concreta, dinámica y eficiente, a efectos de asegurar las condiciones mínimas para una vida acorde con el principio-derecho de dignidad humana”^[6].

15. Asimismo, el Tribunal acotó, en la mencionada sentencia, que

(...) sostener que los derechos sociales se reducen a un vínculo de responsabilidad política entre el constituyente y el legislador, no solo es una ingenuidad en cuanto a la existencia de dicho vínculo, sino también una distorsión evidente en cuanto al sentido y coherencia que debe mantener la Constitución (...). En consecuencia, la exigencia judicial de un derecho social dependerá de factores tales como la gravedad y razonabilidad del caso, su vinculación o afectación de otros derechos y la disponibilidad presupuestal del Estado, siempre y cuando puedan comprobarse acciones concretas de su parte para la ejecución de políticas sociales”

c) El proceso de cumplimiento, la inacción administrativa y la protección “indirecta” del derecho a la salud

16. El Tribunal Constitucional ha sostenido también que el contenido constitucionalmente protegido del derecho a la salud

(...) comprende la facultad que tiene todo ser humano de mantener la normalidad orgánica funcional, tanto física como mental; y de restablecerse cuando se presente una perturbación en la estabilidad orgánica y funcional de su ser, lo que implica, por tanto, una acción de conservación y otra de restablecimiento; acciones que el Estado debe proteger tratando de que todas las personas, cada día, tengan una mejor calidad de vida, para lo cual debe invertir en la modernización y fortalecimiento de todas las instituciones encargadas de la prestación del servicio de salud, debiendo adoptar políticas, planes y programas en ese sentido”^[8].

17. De ello se desprende que, la protección del derecho a la salud se relaciona con la obligación por parte del Estado de realizar todas aquellas acciones tendentes a prevenir los daños a la salud de las personas, conservar las condiciones necesarias que aseguren el efectivo ejercicio de este derecho, y atender, con la urgencia y eficacia que el caso lo exija, las situaciones de afectación a la salud de toda persona, prioritariamente aquellas vinculadas con la salud de los niños, adolescentes, madres y ancianos, entre otras.

18. En cuanto a la protección «indirecta» del derecho a la salud mediante el proceso de cumplimiento, cabe destacar que procederá siempre y cuando exista un mandato claro, concreto y vigente contenido en una norma legal o en un acto administrativo, mandato que precisamente se deberá encontrar en una relación indisoluble con la protección del referido derecho fundamental.

19. Conforme se desprende del artículo 200, inciso 6, de la Constitución, que establece que

“La Acción de Cumplimiento (...) procede contra cualquier autoridad o funcionario renuente a acatar una norma legal o un acto administrativo, sin perjuicio de las responsabilidades de ley”, el objeto de este proceso es el control de la inactividad administrativa, que se produce cuando la autoridad o funcionario se muestra renuente a acatar un mandato que se encuentra obligado(a) a cumplir.

20. Desarrollando este precepto, el legislador estableció, en el artículo 66 del Código Procesal Constitucional, que el proceso de cumplimiento tiene como objeto ordenar que el funcionario o autoridad pública renuente

1) Dé cumplimiento a una norma legal o ejecute un acto administrativo firme; o

2) Se pronuncie expresamente cuando las normas legales le ordenan emitir una resolución administrativa o dictar un reglamento.

21. De este modo, en el proceso de cumplimiento no solo se examina: a) si el funcionario o autoridad pública ha omitido cumplir una actuación administrativa debida que es exigida por un mandato contenido en una ley o en un acto administrativo, sino, además, b) si este funcionario o autoridad pública ha omitido realizar un acto *jurídico* debido, ya sea que se trate de la expedición de resoluciones administrativas o del dictado de reglamentos, de manera conjunta o unilateral.

22. Como es de verse, el proceso de cumplimiento sirve para controlar la inacción de los funcionarios o autoridades públicas, de modo tal que se puedan identificar conductas omisivas, actos pasivos e inertes o la inobservancia de los deberes que la ley les impone a estos funcionarios y autoridades públicas, y, a consecuencia de ello, se ordene el cumplimiento del acto omitido o el cumplimiento eficaz del acto aparente o defectuosamente cumplido, y se determine el nivel de responsabilidades, si las hubiere.

23. Y es que en virtud del principio de legalidad de la función ejecutiva, los agentes públicos deben fundar todas sus actuaciones en la normativa vigente. “El principio de vinculación positiva de la Administración a la Ley’ exige que la certeza de validez de toda acción administrativa dependa de la medida en que pueda referirse a un precepto jurídico o que, partiendo de este, pueda derivarse como su cobertura o desarrollo necesario. El marco normativo para la administración es un valor indisponible, *motu proprio*, irrenunciable ni transigible”.^[9]

24. Precisamente, el apartado 1.1. del artículo IV del Título Preliminar de la Ley 27444, del Procedimiento Administrativo General, establece que “Las autoridades administrativas deben actuar con respeto a la Constitución, la ley y al derecho,

dentro de las facultades que le estén atribuidas y de acuerdo con los fines para los que les fueron conferidas”.

25. De este modo se evidencia cómo, en el ámbito de la administración pública, las actuaciones de los funcionarios y autoridades públicas deben desarrollarse dentro del marco normativo establecido en la ley y en la Constitución, marco que contiene sus competencias, así como los límites de su actuación, por lo que resultan arbitrarias aquellas actuaciones, entre otras, que deliberadamente omitan el cumplimiento de un mandato contenido en una ley o en un acto administrativo; omitan expedir resoluciones administrativas o dictar reglamentos, o cumplan aparente, parcial o defectuosamente tales mandatos.
26. En directa relación con lo expuesto se encuentra el imperativo de que tales funcionarios y autoridades cumplan los respectivos mandatos dentro de los plazos asignados, bajo responsabilidad de ley, y que, de no encontrarse fijados tales plazos, los mandatos se acaten dentro de un plazo razonable y proporcional, debiendo tenerse siempre en consideración el nivel de urgente atención que requieren determinados derechos, principalmente los fundamentales, que pueden resultar afectados por el incumplimiento de los mandatos.

§3. El cumplimiento de la Ley 26842 y la protección del derecho a un medio ambiente equilibrado y adecuado al desarrollo de su vida

27. Teniendo en cuenta que el proceso de autos se relaciona con el cumplimiento de un mandato contenido en una ley, el mismo que, a su vez, tiene como finalidad la protección del derecho a un medio ambiente equilibrado y adecuado al desarrollo de la vida, conviene examinar determinados elementos que forman parte del contenido constitucionalmente protegido de este derecho.
28. El artículo 2, inciso 22, de la Constitución, reconoce el derecho de toda persona
- (...) a la paz, a la tranquilidad, al disfrute del tiempo libre y al descanso, así como a gozar de un ambiente equilibrado y adecuado al desarrollo de su vida”.
29. Sobre el particular el Tribunal Constitucional ha señalado en el caso Regalías Mineras, que

El contenido del derecho fundamental a un medio ambiente equilibrado y adecuado para el desarrollo de la persona está determinado por los siguientes elementos, a saber: 1) el derecho de gozar de ese medio ambiente, y 2) el derecho a que ese medio ambiente se preserve.

En su primera manifestación, esto es, el derecho de gozar de un medio ambiente equilibrado y adecuado, dicho derecho comporta la facultad de las personas de poder disfrutar de un medio ambiente en

el que sus elementos se desarrollan e interrelacionan de manera natural y armónica; y, en el caso de que el hombre intervenga, no debe suponer una alteración sustantiva de la interrelación que existe entre los elementos del medio ambiente. Esto supone, por tanto, el disfrute no de cualquier entorno, sino únicamente del adecuado para el desarrollo de la persona y de su dignidad (artículo 1 de la Constitución). De lo contrario, su goce se vería frustrado y el derecho quedaría, así, carente de contenido.

Pero también el derecho en análisis se concretiza en el derecho a que el medio ambiente se preserve. El derecho a la preservación de un medio ambiente sano y equilibrado entraña obligaciones ineludibles, para los poderes públicos, de mantener los bienes ambientales en las condiciones adecuadas para su disfrute. A juicio de este Tribunal, tal obligación alcanza también a los particulares, y con mayor razón a aquellos cuyas actividades económicas inciden, directa o indirectamente, en el medio ambiente.^[10]

30. Por otro lado, el Tribunal Constitucional apuntó que en cuanto al vínculo existente entre la producción económica y el derecho a un ambiente equilibrado y adecuado al desarrollo de la vida, deben coexistir los siguientes principios, entre otros, para garantizar de mejor manera la protección del derecho materia de evaluación:

En cuanto al vínculo existente entre la producción económica y el derecho a un ambiente equilibrado y adecuado al desarrollo de la vida, se materializa en función de los principios siguientes: a) el principio de desarrollo sostenible o sustentable (...); b) el principio de conservación, en cuyo mérito se busca mantener en estado óptimo los bienes ambientales; c) el principio de prevención, que supone resguardar los bienes ambientales de cualquier peligro que pueda afectar su existencia; d) el principio de restauración, referido al saneamiento y recuperación de los bienes ambientales deteriorados; e) el principio de mejora, en cuya virtud se busca maximizar los beneficios de los bienes ambientales en pro del disfrute humano; f) el principio precautorio, que comporta adoptar medidas de cautela y reserva cuando exista incertidumbre científica e indicios de amenaza sobre la real dimensión de los efectos de las actividades humanas sobre el ambiente; y, g) el principio de compensación, que implica la creación de mecanismos de reparación por la explotación de los recursos no renovables.^[11]

31. Entre los citados principios cabe destacar que el *principio de desarrollo sostenible o sustentable* constituye una pauta basilar para que la gestión humana sea capaz de generar una mayor calidad y mejores condiciones de vida en beneficio de la población actual, pero manteniendo la potencialidad del ambiente para satisfacer las necesidades y las aspiraciones de vida de las generaciones futuras. Por ende, propugna que la utilización de los bienes ambientales para el consumo no se “financien” incurriendo en “deudas” sociales para el porvenir.

32. Asimismo cabe anotar que el *principio precautorio o de precaución* opera en situaciones donde se presenten amenazas de un daño a la salud o al medio ambiente y donde no se tenga certeza científica de que dichas amenazas puedan constituir un grave daño. Tal principio se encuentra reconocido en nuestro ordenamiento interno, entre otros, en el artículo VII del Título Preliminar de la Ley General del Ambiente, 28611, así como en el artículo 10, inciso f, del Decreto Supremo 0022-2001-PCM, donde se establece que

Son instrumentos de la Política Nacional Ambiental las normas, estrategias, planes y acciones que establece el CONAM y las que proponen y disponen, según sea el caso, en cada nivel –nacional, regional y local– las entidades del sector público, del sector privado y la sociedad civil. El sustento de la política y de sus instrumentos lo constituyen los siguientes lineamientos: (...) f) la aplicación del criterio de precaución, de modo que, cuando haya peligro de daño grave o irreversible, la falta de certeza absoluta no deberá utilizarse como razón para postergar la adopción de medidas eficaces para impedir la degradación del ambiente.

33. Finalmente, en la Declaración de Río sobre el Medio Ambiente y el Desarrollo, del mes de junio de 1992, que tiene entre sus principales fines la integridad del sistema ambiental y de desarrollo mundial, se proclama, entre otras cosas, una serie de principios, entre los que mencionaremos los siguientes:

Principio 1. Los seres humanos constituyen el centro de las preocupaciones relacionadas con el desarrollo sostenible. Tienen derecho a una vida saludable y productiva en armonía con la naturaleza.

Principio 3. El derecho al desarrollo debe ejercerse en forma tal que responda equitativamente a las necesidades de desarrollo y ambientales de las generaciones presentes y futuras.

Principio 4. A fin de alcanzar el desarrollo sostenible, la protección del medio ambiente deberá constituir parte integrante del proceso de desarrollo y no podrá considerarse en forma aislada.

Principio 10. El mejor modo de tratar las cuestiones ambientales es con la participación de todos los ciudadanos interesados, en el nivel que corresponda. En el plano nacional, toda persona deberá tener acceso adecuado a la información sobre el medio ambiente de que dispongan las autoridades públicas, incluida la información sobre los materiales y las actividades que encierran peligro en sus comunidades, así como la oportunidad de participar en los procesos de adopción de decisiones. Los Estados deberán facilitar y fomentar la sensibilización y la participación de la población poniendo la información a disposición de todos. Deberá proporcionarse acceso efectivo a los procedimientos judiciales y administrativos, entre éstos el resarcimiento de daños y los recursos pertinentes.

Principio 11. Los Estados deberán promulgar *leyes eficaces sobre el medio ambiente*. Las normas, los objetivos de ordenación y las prioridades ambientales deberían reflejar el contexto ambiental y de desarrollo al que se aplican (...).[énfasis agregado]

Principio 13. Los Estados deberán desarrollar la legislación nacional relativa a la responsabilidad y la indemnización respecto de las víctimas de la contaminación y otros daños ambientales. Los Estados deberán cooperar, asimismo, de manera expedita y más decidida en la elaboración de nuevas leyes internacionales sobre responsabilidad e indemnización por los efectos adversos de los daños ambientales causados por las actividades realizadas dentro de su jurisdicción, o bajo su control, en zonas situadas fuera de su jurisdicción.

Principio 15. Con el fin de proteger el medio ambiente, los Estados deberán aplicar ampliamente el criterio de precaución conforme a sus capacidades. Cuando haya peligro de daño grave o irreversible, la falta de certeza científica absoluta no deberá utilizarse como razón para postergar la adopción de medidas eficaces en función de los costos para impedir la degradación del medio ambiente.

Principio 16. Las autoridades nacionales deberían procurar fomentar la internalización de los costos ambientales y el uso de instrumentos económicos, teniendo en cuenta el criterio de que el que contamina debe, en PRINCIPIO, cargar con los costos de la contaminación, teniendo debidamente en cuenta el interés público y sin distorsionar el comercio ni las inversiones internacionales.

Principio 17. Deberá emprenderse una evaluación del impacto ambiental, en calidad de instrumento nacional, respecto de cualquier actividad propuesta que probablemente haya de producir un impacto negativo considerable en el medio ambiente y que esté sujeta a la decisión de una autoridad nacional competente.

§4. Análisis del caso concreto. La actuación del Ministerio de Salud ante el grave estado de salud de la población de La Oroya

a) El proceso de cumplimiento y la exigencia de actuación «eficaz» de la administración

34. Habiéndose verificado los bienes jurídicos cuya protección se demanda a tenor de las disposiciones de la Ley 26842, General de Salud, y del Decreto Supremo 074-2001-PCM, Reglamento de Estándares Nacionales del Calidad Ambiental, y cuyo cumplimiento se exige en el presente proceso, es pertinente examinar las tres pretensiones de los demandantes.
35. Cabe puntualizar, en primer término, que, conforme a los mencionados artículos 200, inciso 6, de la Constitución y 66 ss. del Código Procesal Constitucional, para exigir el cumplimiento de la norma legal, la ejecución del acto administrativo y la orden de emisión de una resolución, además de la renuencia del funcionario o

autoridad pública, el mandato contenido en aquellos deberá reunir los siguientes requisitos mínimos comunes, entre otros: ^[12]

- a) Ser un mandato vigente.
- b) Ser un mandato cierto y claro, es decir, debe inferirse indubitablemente de la norma legal o del acto administrativo.
- c) No estar sujeto a controversia ni a interpretaciones dispares.
- d) Ser de ineludible y obligatorio cumplimiento.
- e) Ser incondicional. Excepcionalmente, podrá tratarse de un mandato condicional, siempre y cuando se haya acreditado haber satisfecho las condiciones que la satisfacción no sea compleja y que no requiera de actuación probatoria.

36. Asimismo, en la susodicha sentencia el Tribunal Constitucional recalcó que

(...) el acatamiento de una norma legal o un acto administrativo tiene su más importante manifestación en el nivel de su eficacia” ^[13]

Por ello, como se mencionó antes, el proceso de cumplimiento tiene como finalidad proteger la eficacia de las normas legales y los actos administrativos. Carecería, por tanto, de objeto un proceso como el de autos si el cumplimiento de los mandatos se realizara de manera “aparente”, “parcial” o “deficiente”.

37. En otros términos, el proceso de cumplimiento no puede tener como finalidad el examen sobre el cumplimiento “formal” del mandato contenido en una norma legal o acto administrativo, sino, más bien, el examen sobre el cumplimiento *eficaz* de tal mandato, por lo que si en un caso concreto se verifica la existencia de actos de cumplimiento aparente, parcial, incompleto o imperfecto, el proceso de cumplimiento servirá para exigir a la autoridad administrativa precisamente el cumplimiento eficaz de lo dispuesto en el mandato.

b) El estado de salud de la población de La Oroya y la contaminación por plomo en sangre

38. Antes de ingresar al análisis de las pretensiones planteadas por los demandantes, así como de la actuación del Ministerio de Salud y, en especial, de la Dirección General de Salud Ambiental (Digesa), es preciso saber cuál es el estado de salud de la población de La Oroya, toda vez que tal examen va a resultar decisivo para determinar el nivel de “eficacia” de las medidas adoptadas por los referidos órganos administrativos en cumplimiento de la Ley 26842, General de Salud, y del Decreto Supremo 074-2001-PCM, Reglamento de Estándares Nacionales de Calidad Ambiental del Aire.

39. A fojas 48 de autos aparece la clasificación de niveles de plomo en sangre y las respectivas acciones recomendadas, elaborada por el Centro de Control de

Enfermedades de Estados Unidos (CDC), la misma que se consigna en calidad de anexo del “Estudio de Niveles de Plomo en la Sangre de la Población en La Oroya 2000-2001”, realizado por la empresa Doe Run Perú, que establece lo siguiente:

Plomo en sangre ($\mu\text{g}/100\text{ ml}$)	Acción recomendada
Menor a 9	Un niño clase 1 no está intoxicado por plomo. Se recomienda análisis de plomo de rutina
De 10 a 14	Análisis periódico de plomo. Si son varios niños se deben considerar actividades primarias de prevención
De 15 a 19	Análisis periódico de plomo. Llevar historial para valorar posibles fuentes de plomo. Revisar la dieta y limpieza de los miembros de la familia. Analizar el nivel de hierro. Debe considerarse una investigación ambiental si los niveles persisten
De 20 a 44	Requiere de evaluación médica completa. Identificar y eliminar la fuente ambiental de plomo
De 45 a 69	Iniciar tratamiento médico, valoración y resolución ambiental en las próximas 48 horas
Más de 70	Hospitalización, iniciar tratamiento médico, valoración y resolución ambiental inmediatamente.

40. En los informes adjuntados en autos, se expresa lo siguiente: en el “Estudio de Plomo en sangre en una población seleccionada de La Oroya”, realizado en 1999 por la Dirección General de Salud Ambiental (Digesa) del Ministerio de Salud, se encontraron los siguientes resultados (f. 23):

Teniendo en cuenta que el límite promedio permisible de plomo en sangre de los niños contenido en los lineamientos de la Organización Mundial de Salud (OMS) es de $10\ \mu\text{g}/100\text{ ml}$:

Grupos de edad	Promedio
De 2 a 4 años	-> $38.6\ \mu\text{g}/100\text{ ml}$
De 4 a 6 años	-> $34.1\ \mu\text{g}/100\text{ ml}$
De 6 a 8 años	-> $36.3\ \mu\text{g}/100\text{ ml}$
De 8 a 10 años	-> $30.6\ \mu\text{g}/100\text{ ml}$
Total	-> $33.6\ \mu\text{g}/100\text{ ml}$

41. Asimismo, en el referido estudio de Digesa, que es de público conocimiento, se hallaron, en los 346 niños evaluados, los siguientes niveles de plomo en la sangre ($\mu\text{g}/100\text{ ml}$):

N.º de niños ($\mu\text{g}/100\text{ ml}$)	Rango de plomo en sangre
3 (0.9%)	0 a $10\ \mu\text{g}/100\text{ ml}$

45	(13.3%)	10.1 a 20 µg/100 ml
234	(67.0%)	20.1 a 44 µg/100 ml
62	(18.3%)	44.1 a 70 µg/100 ml
2	(0.6%)	más de 70 µg/100 ml

42. A su vez, el Informe del Consorcio Unión por el Desarrollo Sustentable de la Provincia de Yauli, La Oroya (UNES), denominado "Evaluación de Niveles de Plomo y Factores de Exposición en Gestantes y Niños Menores de 3 años de la Ciudad de La Oroya", elaborado en el mes de marzo de 2000, obrante de fojas 80 a 114, concluyó que los niveles de contaminación sanguínea de madres gestantes cuyas edades oscilaban entre los 20 y 24 años, era de una media de 39.49 mg/dl, valor que se encuentra, se afirma, muy por encima del límite establecido como seguro por la Organización Mundial de Salud (OMS), que es de 30 mg/dl (f. 90 vuelta).
43. En el mismo informe (f. 95), en lo que se refiere a los resultados encontrados luego del análisis de niños entre los 0 y 2 años de edad, se precisa que "Los resultados de niveles de contaminación sanguínea en niños (...) obtuvieron una media de 41.82 mg/dl y una desviación estándar de 13.09; valores realmente alarmantes al encontrarse muy por encima del valor de 10 µg/dl, establecido como límite seguro por el CDC [Centro de Control de Enfermedades de los Estados Unidos para niños] y la ANP [Academia Norteamericana de Pediatría]".
44. De otro lado, es menester mencionar algunas de las conclusiones extraídas del "Estudio de Niveles de Plomo en la Sangre de la Población en La Oroya 2000-2001, "obrante a fojas 44, realizado por la empresa Doe Run Perú , donde se determinó que

4.1.1. El estudio realizado en la población de La Oroya nos demuestra que los niveles promedio de plomo en sangre de los niños están por encima de los recomendados en los lineamientos de la Organización Mundial de Salud y el Centro para el Control de Enfermedades de Estados Unidos (10 µg/100 ml). Sin embargo, no se observaron signos ni síntomas atribuibles al efecto nocivo del plomo, ni deterioro de rendimiento escolar. Los resultados promedio del total de 5.062 muestras son los siguientes:

- 0 a 3 años: 26.1 µg/100 ml
- 4 a 5 años: 23.7 µg/100 ml
- 7 a 15 años: 20.3 µg/100 ml
- Más de 16: 13.7 µg/100 ml

4.1.2 . Los niveles de plomo en la sangre más altos se encontraron en La Oroya Antigua, siendo los niños de 0 a 6 años la población que presenta mayores niveles. Los promedios de plomo en sangre en esta área son los siguientes:

- 0 a 3 años: 36.7 µg/100 ml
- 4 a 6 años: 32.9 µg/100 ml
- 7 a 15 años: 27.8 µg/100 ml
- Más de 16: 18.0 µg/100 ml

45. Asimismo, conforme aparece a fojas 553 vuelta, el Ministerio de Salud, mediante la Dirección Regional de Salud de Junín, en el documento denominado "Plan Operativo 2005 para el Control de los Niveles de Plomo en Sangre en la Población Infantil y Gestantes de La Oroya Antigua", elaborado en el mes de febrero de 2005, sostuvo que "La situación ambiental en La Oroya se ha venido degradando desde la entrada en operación de la fundición, con la constante acumulación de pasivos ambientales en la zona de influencia, degradando suelos, flora y fauna, así como la asimilación de plomo en la población residente en La Oroya".
46. A fojas 623 ss. corre el documento elaborado por el Ministerio de Salud, denominado "Dosaje de plomo en sangre en niños menores de 6 años. La Oroya Junín Perú", elaborado entre los meses de noviembre de 2004 y enero de 2005, en el que se aprecian los siguientes resultados:

N.º de niños		Niveles de plomo en niños (µg/dl)	
1	(0,127%)	menos de 10	µg/dl
16	(2,03%)	10 a 15	µg/dl
54	(6.85%)	15 a 20	µg/dl
646	(81,98%)	20 a 45	µg/dl
66	(8,38%)	45 a 70	µg/dl
5	(0,63%)	70 a más	µg/dl

47. A fojas 774 ss. aparece el documento denominado "Desarrollo de un Plan de Intervención Integral para Reducir la Exposición al Plomo y otros Contaminantes en el Centro Minero de La Oroya, Perú", preparado en el mes de agosto de 2005 por el equipo de asistencia técnica del Centro de Control y Prevención de Enfermedades de Estados Unidos (CDC), para la Agencia para el Desarrollo Internacional del Gobierno de los Estados Unidos (AID), con el objetivo de apoyar a los funcionarios de la Dirección General de Salud Ambiental (Digesa) del Perú, en el que se consignaron las siguientes conclusiones:

1. *Existe un control mínimo del plomo.* (...) Ninguna autoridad independiente de gobierno monitorea la efectividad y el impacto de las intervenciones implementadas. La presencia de plomo en el suelo, polvo, agua y aire probablemente continuará manteniendo niveles elevados de plomo en la sangre de las personas de La Oroya y sus alrededores. Discusiones interminables retrasan la protección que los niños pequeños necesitan en La Oroya.

2. *Existe una fragmentación entre las autoridades responsables del control del plomo.* (...) el equipo de DIGESA reporta que no tiene los recursos o autoridad para abordar la problemática en La Oroya (...).

5. *No han sido determinados los impactos en el medio ambiente y la salud. No se ha establecido una línea de base con las medidas e impactos en la salud humana y en el ambiente para la región (...)*”.

48. Finalmente, a fojas 91 y 92 del cuaderno del Tribunal Constitucional obra el “Estudio sobre la contaminación ambiental en los hogares de La Oroya y Concepción y sus efectos en la salud de sus residentes”, elaborado en el mes de diciembre de 2005 por el consorcio conformado por la Universidad de San Luis, Missouri, Estados Unidos, y el Arzobispado de Huancayo, estudio en el que se llega, entre otras, a las siguientes conclusiones:

Los niveles de plomo en sangre encontrados en La Oroya son similares a los encontrados en monitoreos anteriores realizados por la DIGESA y el MINSA (...).

Desde el punto de vista de la salud comunitaria, estos niveles ilustran una vez más el grave estado de envenenamiento con plomo que existe en la población de La Oroya, especialmente en los grupos más vulnerables, como son los infantes y niños de corta edad.

49. Como se aprecia en los citados estudios, desde el año 1999 la propia Dirección General de Salud Ambiental (Digesa), así como diferentes instituciones acreditaron la existencia de exceso de contaminación en el aire de la ciudad de La Oroya, y que en el caso de contaminación por plomo en la sangre, especialmente en los niños, se sobrepasó el límite máximo establecido por la Organización Mundial de la Salud (10 $\mu\text{g}/100\text{ ml}$), llegándose incluso a detectar, por ejemplo, en el Informe DIGESA 1999, *2 casos de niños en los que se sobrepasaba los 70 $\mu\text{g}/100\text{ml}$, 62 niños que registraban entre 44.1 y 62 $\mu\text{g}/100\text{ ml}$, y 234 que registraban entre 20.1 y 44 $\mu\text{g}/100\text{ ml}$* , entre otros resultados, lo que exigía por parte del Ministerio de Salud, en su condición de ente rector del sector Salud (artículo 2 de la Ley 27657 del Ministerio de Salud), la adopción de inmediatas medidas de protección, recuperación y rehabilitación de la salud de las personas que habitan en la ciudad, entre otras acciones.

c) Examen de la primera pretensión: implementar una estrategia de salud pública de emergencia para La Oroya

50. Los demandantes exigen el cumplimiento, entre otros, de los siguientes artículos de la Ley 26842, General de Salud:

Artículo 103.- La protección del ambiente es responsabilidad del Estado y de las personas naturales y jurídicas, los que tienen la obligación de mantenerlo dentro de los estándares que para preservar la salud de las personas, establece la Autoridad de Salud competente.

Artículo 105.- Corresponde a la Autoridad de Salud competente dictar las medidas necesarias para minimizar y controlar los riesgos para la salud de las personas derivados de elementos, factores y

agentes ambientales, de conformidad con lo que establece, en cada caso, la ley de la materia.

Artículo 106.- Cuando la contaminación del ambiente signifique riesgo o daño a la salud de las personas, la Autoridad de Salud de nivel nacional dictará las medidas de prevención y control indispensables para que cesen los actos o hechos que ocasionan dichos riesgos y daños.

51. Asimismo, solicitan el cumplimiento, entre otros, de los siguientes artículos del Decreto Supremo 074-2001-PCM, Reglamento de Estándares Nacionales del Calidad Ambiental:

Artículo 11.- Diagnóstico de Línea Base.- El diagnóstico de línea base tiene por objeto evaluar de manera integral la calidad del aire en una zona y sus impactos sobre la salud y el ambiente. Este diagnóstico servirá para la toma de decisiones correspondientes a la elaboración de los Planes de acción y manejo de la calidad del aire. Los diagnósticos de línea de base serán elaborados por el Ministerio de Salud, a través de la Dirección General de Salud Ambiental - DIGESA, en coordinación con otras entidades públicas sectoriales, regionales y locales así como las entidades privadas correspondientes, sobre la base de los siguientes estudios, que serán elaborados de conformidad con lo dispuesto en los artículos 12, 13, 14 y 15 de esta norma:

- a) Monitoreo
- b) Inventario de emisiones
- c) Estudios epidemiológicos.

....

Consideraciones del Tribunal Constitucional

56. Sobre el particular, el Tribunal Constitucional considera que la pretensión de los demandantes debe estimarse en parte, toda vez que, si bien el Ministerio de Salud ha adoptado determinadas medidas, establecidas en la Ley 26842, General de Salud, y en el Decreto Supremo 074-2001-PCM, Reglamento de Estándares Nacionales del Calidad Ambiental del Aire, su cumplimiento no ha sido eficaz, sino más bien parcial e incompleto.
57. En efecto, de la revisión de autos se desprende que desde la entrada en vigencia de los mencionados artículos de la Ley 26842 (21 de enero de 1998) y del referido Reglamento (25 de junio de 2001), ha transcurrido en exceso un plazo razonable para que el Ministerio de Salud, en especial la Dirección General de Salud Ambiental (Digesa), cumpla eficazmente los mandatos contenidos en las mencionadas disposiciones.
58. Cabe precisar que si bien es cierto que conforme al artículo 20 del Decreto Supremo 074-2001-PCM, la elaboración de un *Plan de Acción* es responsabilidad

de la GESTA Zonal del Aire (Grupo de Estudio Técnico Ambiental de la Calidad del Aire encargado de formular y evaluar los planes de acción para el mejoramiento de la calidad del aire en una Zona de Atención Prioritaria), y no directamente del Ministerio de Salud, también lo es que tal grupo, para la elaboración del mencionado Plan de Acción, requiere, imprescindiblemente, el diagnóstico de línea base que debe elaborar el citado ministerio, a través de la Dirección General de Salud Ambiental (Digesa), conforme lo dispone el artículo 11 del referido Decreto Supremo, por lo que, al no haberse cumplido tal mandato en un plazo razonable, debe exigirse su inmediata observancia, de modo tal que se pueda implementar, con la urgencia del caso, el respectivo Plan de Acción y se proceda, con celeridad, a la recuperación de la salud de la población afectada.

59. No obstante lo expuesto, debe tenerse en cuenta el mandato dispuesto en el mencionado artículo 106, que establece que “Cuando la contaminación del ambiente signifique riesgo o daño a la salud de las personas, la *Autoridad de Salud de nivel nacional* dictará las medidas de prevención y control indispensables para que cesen los actos o hechos que ocasionan dichos riesgos y daños”, así como el mandato del artículo 2 de la Ley 27657, que dispone que “El Ministerio de Salud es (...) el ente rector del Sector Salud que conduce, regula y promueve la intervención del Sistema Nacional de Salud, con la finalidad de lograr el desarrollo de la persona humana, a través de la promoción, *protección, recuperación y rehabilitación de su salud* y del desarrollo de un entorno saludable, con pleno respeto de los derechos fundamentales de la persona, desde su concepción hasta su muerte natural”, cuyo cumplimiento también es exigido en la demanda de autos (ff.13 y 15), pues en conjunto dichos mandatos exigen al Ministerio de Salud, en su calidad de ente rector del Sistema Nacional de Salud, la protección, recuperación y rehabilitación de la salud de las personas, no solo mediante la implementación de un «sistema ordinario», sino también mediante la implementación de un «sistema de emergencia» que establezca acciones inmediatas ante situaciones de grave afectación de la salud de la población [énfasis agregado].
60. En el caso concreto de la población de la ciudad de La Oroya, sobre todo de los niños y mujeres gestantes, ocurre que desde 1999, año en que se realizaron los primeros estudios que determinaron la existencia de población contaminada con plomo en la sangre, hasta la actualidad, han transcurrido más de 7 años sin que el Ministerio de Salud implemente un sistema de emergencia que proteja, recupere y rehabilite la salud de la población afectada. Por ello, cabe preguntarse: ¿cuánto más se debe esperar para que el Ministerio de Salud cumpla su deber de dictar las medidas indispensables e inmediatas para que se otorgue atención médica especializada a la población de La Oroya cuya sangre se encuentra contaminada con plomo?
61. El mandato contenido en las referidas disposiciones, cuyo cumplimiento es responsabilidad del Ministerio de Salud, se encuentra indisolublemente ligado a la protección del derecho fundamental a la salud de los niños y mujeres gestantes de La Oroya, cuya sangre se encuentra contaminada con plomo, tal

como se ha acreditado en autos. No es válido sostener que la protección de este derecho fundamental, por su dimensión de derecho social, deba diferirse en el tiempo a la espera de determinadas políticas de Estado. Tal protección debe ser inmediata, pues la grave situación que atraviesan los niños y mujeres gestantes contaminados, exige del Estado una intervención concreta, dinámica y eficiente, dado que, en este caso, el derecho a la salud se presenta como un derecho exigible y, como tal, de ineludible atención. Por tanto, debe ordenarse al Ministerio de Salud que, en el plazo de 30 días, implemente un sistema de emergencia para atender la salud de la personas contaminadas con plomo, en el caso de la ciudad de La Oroya, a efectos de lograr su inmediata recuperación.

d) Examen de la segunda pretensión: declarar en Estado de Alerta a la ciudad de La Oroya

62. ...

Consideraciones del Tribunal Constitucional

65. Sobre el particular, el Tribunal Constitucional considera que la pretensión de los demandantes debe estimarse, toda vez que en el presente caso el Ministerio de Salud no ha realizado, con la urgencia que el caso concreto exige, las acciones eficaces tendientes a declarar en estado de alerta la ciudad de La Oroya, pese a la evidente existencia de exceso de concentración de contaminantes del aire en la mencionada localidad, incumpliendo el mandato contenido en el artículo 23 del Decreto Supremo 074-2001-PCM, así como en el artículo 105 de la Ley 26842.

....

70. En el presente caso de los documentos anexados a la demanda se advierte que los niveles de contaminación por plomo y otros elementos químicos en la ciudad de La Oroya han sobrepasado estándares mínimos reconocidos internacionalmente, generando graves afectaciones de los derechos a la salud y a un medio ambiente equilibrado y adecuado de la población de esta ciudad, razón por la cual el emplazado Ministerio de Salud está en la obligación, conforme a los mandatos contenidos en los artículos 23 del Decreto Supremo 074-2001-PCM y 105 de la Ley 26842, de realizar, urgentemente, las acciones pertinentes para la implementación de un sistema que permita la declaración del respectivo estado de alerta y, de este modo, atender la salud de la población afectada.

71. La existencia de un convenio suscrito entre el Ministerio de Salud y la empresa Doe Run Perú (Convenio 008-2003-MINSA, suscrito el 4 de julio del 2003), obrante a fojas 363 ss., cuyas cláusulas se han centrado en establecer una “cultura de prevención, a fin de que la población adopte hábitos saludables que disminuyan su exposición al plomo[...]”, “implementar un sistema de vigilancia ambiental en la ciudad de La Oroya priorizando la zona de La Oroya Antigua [...]”, “reducir paulatinamente los niveles de plomo en sangre en la población infantil de la ciudad de La Oroya (...)”, e “impulsar y propugnar la suscripción de convenios de cooperación y gestión con las diversas instituciones

públicas y privadas, sin cuya participación no se lograría el objeto de este convenio [...]”.

72. Asimismo, en la parte referida a las obligaciones de la empresa Doe Run Perú, se determina como actuaciones prioritarias aquellas destinadas a “brindar apoyo logístico [...]”, “realizar los análisis químicos de las muestras biológicas y ambientales [...]”, “realizar campañas educativas y de prevención que incluyan estrategias en la búsqueda de cambios de comportamiento de la población de la zona, con la finalidad de disminuir realmente los niveles de intoxicación de la población y que esta adquiera estilos de vida saludable, protegiendo a los niños y a las madres gestantes”, entre otras.
73. Sobre el particular, este Colegiado considera que, si bien en la labor de atención de la salud de la población es importante una actuación conjunta entre el Ministerio de Salud y empresas privadas, ante situaciones de grave alteración de la salud como la contaminación por plomo en sangre, como sucede en el caso de los niños y mujeres gestantes de la ciudad de La Oroya, el Ministerio de Salud, dada su condición de ente rector del sector Salud, es el principal responsable de la recuperación inmediata de la salud de los pobladores afectados, debiendo priorizarse a los niños y las mujeres gestantes. En consecuencia, teniendo en cuenta que, conforme se ha acreditado en los párrafos precedentes, existe exceso de concentración de contaminantes en el aire de la ciudad de La Oroya, debe ordenarse al Ministerio de Salud la realización de todas las acciones dirigidas a declarar el estado de alerta, conforme lo dispone el artículo 23 del Decreto Supremo 074-2001-PCM, de modo tal que se establezcan medidas inmediatas con el propósito de disminuir el riesgo de salud en esta localidad.

e) Examen de la tercera pretensión: establecer programas de vigilancia epidemiológica y ambiental en la ciudad de La Oroya

...

Consideraciones del Tribunal Constitucional

77. Sobre el particular el Tribunal Constitucional considera que la pretensión de los demandantes debe estimarse, toda vez que en el presente caso el Ministerio de Salud ha omitido establecer “eficazmente” acciones destinadas a establecer programas de vigilancia epidemiológica y ambiental, incumpliendo el mandato contenido en el artículo 15 del Decreto Supremo 074-2001-PCM.
78. En efecto, en principio cabe tener en cuenta que, conforme se aprecia en el Decreto Supremo 074-2001-PCM, existen diferencias entre los denominados “estudios epidemiológicos” (artículo 14) y los “programas de vigilancia epidemiológica y ambiental” (artículo 15), pues estos últimos son estudios *complementarios* que debe realizar el Ministerio de Salud cuando lo justifique la diferencia existente entre los estándares nacionales de calidad

ambiental del aire y los valores encontrados en una determinada zona, de modo tal que se puedan evitar riesgos a la respectiva población.

79. En el presente caso, los demandados no han acreditado haber dado cumplimiento, en su totalidad, al mandato del referido artículo 15, pues no han desarrollado programas de vigilancia epidemiológica y ambiental en la ciudad de La Oroya. En consecuencia, debe estimarse esta pretensión y ordenarse al Ministerio de Salud la implementación de los referidos programas de vigilancia.

Por estos fundamentos, el Tribunal Constitucional, con la autoridad que le confiere la Constitución Política del Perú

HA RESUELTO

Declarar **FUNDADA** en parte la demanda de cumplimiento presentada por Pablo Miguel Fabián Martínez y otros; en consecuencia:

1. Ordena que el Ministerio de Salud, en el plazo de treinta (30) días, implemente un sistema de emergencia para atender la salud de la personas contaminadas por plomo en la ciudad de La Oroya, debiendo priorizar la atención médica especializada de niños y mujeres gestantes, a efectos de su inmediata recuperación, conforme se expone en los fundamentos 59 a 61 de la presente sentencia, bajo apercibimiento de aplicarse a los responsables las medidas coercitivas establecidas en el Código Procesal Constitucional.
2. Ordena que el Ministerio de Salud, a través de la Dirección General de Salud Ambiental (Digesa), en el plazo de treinta (30) días, cumpla con realizar todas aquellas acciones tendentes a la expedición del diagnóstico de línea base, conforme lo prescribe el artículo 11° del Decreto Supremo 074-2001-PCM, Reglamento de Estándares Nacionales de Calidad Ambiental del Aire, de modo tal que, cuanto antes, puedan implementarse los respectivos planes de acción para el mejoramiento de la calidad del aire en la ciudad de La Oroya.
3. Ordena que el Ministerio de Salud, en el plazo de treinta (30) días, cumpla con realizar todas las acciones tendentes a declarar el Estado de Alerta en la ciudad de La Oroya, conforme lo disponen los artículos 23 y 25 del Decreto Supremo 074-2001-PCM y el artículo 105 de la Ley 26842.
4. Ordena que la Dirección General de Salud Ambiental (Digesa), en el plazo de treinta (30) días, cumpla con realizar acciones tendientes a establecer programas de vigilancia epidemiológica y ambiental en la zona que comprende a la ciudad de La Oroya.
5. Ordena que el Ministerio de Salud, transcurridos los plazos mencionados en los puntos precedentes, informe al Tribunal Constitucional respecto de las acciones tomadas para el cumplimiento de lo dispuesto en la presente sentencia.

6. Exhorta al Gobierno Regional de Junín, Municipalidad Provincial de Yauli-La Oroya, Ministerio de Energía y Minas, Consejo Nacional del Ambiente y empresas privadas, como Doe Run Perú SRL, entre otras, que desarrollan sus actividades mineras en la zona geográfica que comprende a la ciudad de La Oroya, a participar, urgentemente, en las acciones pertinentes que permitan la protección de la salud de los pobladores de la referida localidad, así como la del medio ambiente en La Oroya, debiendo priorizarse, en todos los casos, el tratamiento de los niños y las mujeres gestantes....

2. Domitila Rosario Piche Osorio, conocida por Domitila Rosario Piche Estrada, en contra del Ministro y de la Viceministra del Medio Ambiente y Recursos Naturales, (El Salvador, 2010),

Sala de lo Constitucional de la Corte Suprema de Justicia. San Salvador, a las diez horas y cuatro minutos del día treinta de enero de dos mil trece.

El presente proceso de amparo ha sido promovido por la señora Domitila Rosario Piche Osorio, conocida por Domitila Rosario Piche Estrada, en contra del Ministro y de la Viceministra del Medio Ambiente y Recursos Naturales, por la supuesta vulneración de sus derechos fundamentales de petición y acceso a la información.

Han intervenido en la tramitación de este amparo la parte actora, las autoridades demandadas y el Fiscal de la Corte Suprema de Justicia.

Analizado el proceso y considerando:

I. 1. La pretensora sostuvo en su demanda que adquirió una vivienda en Villa Burdeos, Ciudad Versailles, la cual se encuentra ubicada en el municipio de San Juan Opico, departamento de La Libertad, en una zona que el Ministerio del Medio Ambiente y Recursos Naturales --en adelante, MARN-- declaró afectada por contaminación con plomo.

En relación con lo anterior, afirmó que con fechas 16, 17, 23 y 27 de septiembre de 2010 presentó diversas solicitudes al Ministro y a la Viceministra de esa cartera de Estado, a efecto de obtener una certificación de los estudios técnicos que se han llevado a cabo sobre los niveles de contaminación encontrados en el proyecto Ciudad Versailles, pero aún no ha recibido resolución alguna que haya atendido sus requerimientos. En virtud de ello, alegó que se le ha vulnerado su derecho de "petición y respuesta", por lo que solicitó que se admitiera su demanda y se pronunciara sentencia a su favor. ...

III. En el presente caso, el objeto de la controversia puesta en conocimiento de este Tribunal estriba en determinar si el Ministro y la Viceministra del MARN han vulnerado los derechos de petición y acceso a la información de la señora Domitila Rosario Piche Osorio, al no haberse pronunciado sobre las solicitudes que esta les presentó en diversas ocasiones a efecto de obtener una certificación de los estudios técnicos que se habían llevado a cabo sobre los niveles de contaminación encontrados en el proyecto Ciudad Versailles, ubicado en el municipio de San Juan Opico, departamento de La Libertad.

IV. A continuación, corresponde hacer referencia a algunos aspectos sobre el contenido básico de los derechos fundamentales que se aducen vulnerados.

1. A. Tal como se sostuvo en las sentencias de fechas 5-I-2009 y 14-XII-2007, pronunciadas en los procesos de Amp. 668-2006 y 705-2006, respectivamente, el

derecho de petición contenido en el art. 18 de la Cn. es la facultad que posee toda persona -natural o jurídica, nacional o extranjera– de dirigirse a las autoridades para formular una solicitud por escrito y de manera decorosa. Como correlativo al ejercicio de este derecho, la autoridad ante la cual se formule una petición debe responderla conforme a las facultades que legalmente le han sido conferidas, en forma congruente y oportuna, haciéndoles saber a los interesados su contenido, lo cual, vale aclarar, no significa que tal resolución deba ser necesariamente favorable a lo pedido, sino solamente emitir la decisión correspondiente.

B. Además, las autoridades legalmente instituidas –que en algún momento sean requeridas para resolver un determinado asunto– tienen la obligación, por una parte, de pronunciarse sobre lo solicitado en un plazo razonable, si no existe un plazo expresamente determinado en el ordenamiento jurídico para ello; y, por otra parte, de motivar y fundamentar debidamente su decisión, siendo necesario que, además, comuniquen lo resuelto al interesado. Por ello, se garantiza y posibilita el ejercicio del derecho de petición cuando una autoridad emite y notifica una decisión a lo que se le ha requerido dentro del plazo establecido o, en su ausencia, dentro de aquel que sea razonable, siendo congruente con lo pedido, siempre en estricta observancia de lo preceptuado en la Constitución y la normativa secundaria pertinente.

C. Específicamente, con relación al plazo en que las autoridades deben resolver las solicitudes que se les presentan, en la sentencia de fecha 11-III-2011, pronunciada en el Amp. 780-2008, se apuntó que se garantiza y posibilita el ejercicio del derecho de petición cuando las autoridades requeridas emiten una resolución dentro del tiempo establecido en la normativa aplicable o, en su ausencia, en uno que resulte razonable a efecto de que los interesados puedan recibir pronta satisfacción. Sin embargo, el mero incumplimiento de los plazos establecidos para formular un pronunciamiento no es constitutivo por sí mismo de vulneración a este derecho, sino solamente aquellas resoluciones que han sido proveídas en un periodo de duración mayor de lo previsible o tolerable, deviniendo en irrazonable.

En virtud de lo anterior, para determinar la irrazonabilidad o no de la duración del plazo para resolver lo pretendido por los interesados, se requiere una concreción y apreciación de las circunstancias del caso en concreto atendiendo a criterios objetivos, como pueden serlo: *la actitud de la autoridad requerida*, en tanto que deberá determinarse si las dilaciones son producto de su inactividad que, sin causa de justificación alguna, dejó transcurrir el tiempo sin emitir una decisión de fondo, u omitió adoptar medidas adecuadas para satisfacer lo solicitado; *la complejidad del asunto*, tanto táctica como jurídica; y *iii) la actitud de las partes* en el proceso o procedimiento respectivo.

D. Finalmente, en la sentencia de fecha 15-VII-2011, pronunciada en el Amp. 78- 2011, se afirmó que el derecho de petición constituye un poder de actuación de las personas de dirigir sus requerimientos a las distintas autoridades que señalen las leyes sobre materias que sean de su competencia. Dichas solicitudes pueden realizarse –desde la perspectiva del contenido material de la

situación jurídica requerida— sobre dos puntos específicos: *i)* sobre un derecho subjetivo o interés legítimo del cual el peticionario es titular y que, en esencia, pretende ejercer ante la autoridad; y *ii)* respecto de un derecho subjetivo, interés legítimo o situación jurídica de la cual el solicitante no es titular pero de la cual pretende su declaración, constitución o incorporación dentro de su esfera jurídica mediante la petición realizada.

De lo anterior se colige que es indispensable que dentro del proceso de amparo el actor detalle cuál es el derecho, interés legítimo o situación jurídica material que pretendería tutelar, ejercer, establecer o incorporar dentro de su esfera jurídica material mediante la petición realizada ante las autoridades competentes, puesto que de esa manera se configurarían plenamente los dos elementos —jurídico y material- del agravio alegado respecto de la omisión de resolver la solicitud formulada.

2. A. La *libertad de información*, asegura la publicación o divulgación, con respeto objetivo a la verdad, de hechos de relevancia pública que permitan a las personas conocer la situación en la que se desarrolla su existencia, de manera que, en cuanto miembros de la colectividad, puedan tomar decisiones libres, debidamente informados. La referida libertad se manifiesta en dos derechos: *i)* el de comunicar libremente la información veraz por cualquier medio de difusión; y *ii)* el de *recibir o acceder a dicha información* en igualdad de condiciones.

En la Constitución, la libertad de información se encuentra adscrita a la disposición constitucional que estatuye la libertad de expresión -art. 6 inc. 1" -, la cual establece que: "Toda persona puede expresar y difundir libremente sus pensamientos...". Y es que, tal como se determinó en la sentencia de Inc. 13-2012, de fecha 5-XII-2012, la libertad de expresión tiene como presupuesto el derecho de investigar o buscar y recibir informaciones de toda índole, *pública o privada*, que tengan interés público. Situación que, además, es reconocida en similares términos en el ámbito internacional, específicamente, en los arts. 19 de la Declaración Universal de Derechos Humanos, 19.2 del Pacto Internacional de Derechos Civiles y Políticos y 13 de la Convención Americana sobre Derechos Humanos.

B. El *derecho a recibir información* implica el libre acceso de todas las personas a las fuentes en las cuales se contienen datos de relevancia pública. La protección constitucional de la búsqueda y obtención de información se proyecta básicamente frente a los poderes públicos -órganos del Estado, sus dependencias, instituciones autónomas, municipalidades - y a cualquier entidad, organismo o persona que administre recursos públicos, bienes del Estado o ejecute actos de la Administración en general, pues existe un principio general de publicidad y transparencia de la actuación del Estado y de la gestión de fondos públicos.

El derecho a obtener información ha sido desarrollado en la Ley de Acceso a la Información Pública, en virtud de la cual toda persona tiene derecho a solicitar y a recibir información generada, administrada o en poder de las instituciones públicas o de cualquier otra entidad, organismo o persona que administre recursos públicos o, en su caso, a que se le indique la institución o la autoridad competente ante la

cual se deba requerir la información. De conformidad con los principios de dicha normativa, la información pública debe ser suministrada al requirente de manera oportuna, transparente, en igualdad de condiciones y mediante procedimientos rápidos, sencillos y expeditos.

C. Por consiguiente —sin tratarse de un listado taxativo—, existirá vulneración al derecho de acceso a la información pública cuando: *i)* de manera injustificada, inmotivada o discriminatoria se niegue o se omita entregar a quien lo requiera, información de carácter público generada, administrada o a cargo de la autoridad o entidad requerida; *ii)* la autoridad proporcione los datos solicitados de manera incompleta o fuera del plazo legal correspondiente o, en su caso, en un plazo excesivo o irrazonable; *iii)* los procedimientos establecidos para proporcionar la información resulten complejos, excesivamente onerosos o generen obstáculos irrazonables o innecesarios para los sujetos que pretendan obtenerla; o *iv)* el funcionario ante el que erróneamente se hizo el requerimiento se abstenga de indicarle al interesado cuál es la institución o autoridad encargada del resguardo de los datos.

V. Desarrollados los puntos previos, corresponde en este apartado analizar si las actuaciones de las autoridades demandadas se sujetaron a la normativa constitucional. ...

B. Detallado el contenido de la prueba incorporada es necesario estudiar el valor probatorio de cada una de ellas. ...

c. En cuanto al derecho de acceso a la información que se alega conculcado, si bien no se ha acreditado dentro de este proceso la existencia de los datos solicitados o que estos se encontraran a disposición de la citada Viceministra, se advierte que cuando la señora Piche Osorio efectuó la petición en referencia —es decir, el 17-IX-2010— ya había sido emitido por parte del Ministro del MARN el Decreto N° 12, de fecha 19-VIII-2010, relativo al Estado de Emergencia Ambiental, en el cual se consignó en su considerando IV que: "... en los meses de julio y agosto del presente año en la zona identificada como Cantón Sitio del Niño, Jurisdicción de San Juan Opico, Departamento de La Libertad, se confirmó mediante la determinación de las concentraciones de plomo en muestras de suelo y agua que persiste contaminación ambiental por plomo en niveles que constituyen un peligro para la salud de la población...".

De lo anterior se colige la existencia de estudios técnicos sobre la emergencia ambiental acontecida en San Juan Opico, por lo que la Viceministra del MARN pudo haberle indicado a la interesada cuál era la autoridad encargada del resguardo de la información o, en su caso, pronunciarse sobre la procedencia de concederle la certificación solicitada, inclusive remitiendo tal requerimiento al funcionario correspondiente.

d. En virtud de lo expuesto, es procedente estimar la pretensión incoada por la trasgresión a los derechos de petición y de acceso a la información de la señora

Domitila Rosario Pinche Osorio, pues se ha comprobado que existen estudios técnicos cuyos resultados podían ser proporcionados a la interesada y que, no obstante haber transcurrido un plazo razonable, la Viceministra del MARN no se ha pronunciado sobre la certificación de la información solicitada.

B. Corresponde ahora verificar si el Ministro del MARN vulneró los derechos de la pretensora por la supuesta omisión de resolver el escrito de fecha 27-IX-2010.

a. Con la prueba relacionada *supra* se ha comprobado que la señora Piche Osorio, por medio del escrito de fecha 27-IX-2010, le requirió al citado Ministro que le entregara certificación del Estudio de Impacto Ambiental del proyecto Ciudad Versailles, San Juan Opico, con la finalidad de asegurarse de que en esa zona no existía otro problema además del ocasionado por el estado de emergencia ambiental decretado. Dicho escrito consignaba el lugar en el que la peticionaria solicitaba recibir las notificaciones respectivas y Fue recibido en el Despacho del señor Ministro en septiembre de 2010 por la señora Ely de López, según se aprecia en el margen inferior derecho de la copia que ha sido incorporada a este expediente, aunque no se distingue con claridad la fecha exacta de su presentación. ...

b. Por consiguiente, con base en la prueba anteriormente detallada, *el Ministro del MARN vulneró los derechos de petición y de acceso a la información de la señora Domitila Rosario Piche Osario, pues omitió comunicarle a esta en un plazo razonable su decisión respecto de la petición que le fue planteada, lo que trajo como consecuencia la imposibilidad de que la demandante conociera oportunamente lo resuelto por dicha institución y, por tanto, se informara si en la zona en cuestión existía otro problema además del que ocasionó el estado de emergencia ambiental decretado, por lo que es procedente estimar este aspecto de la pretensión incoada por la referida señora.*

C En este apartado se debe examinar si el Ministro del MARN conculcó los derechos invocados por la pretensora por la supuesta omisión de resolver las peticiones que le fueron presentadas en los escritos de fechas 16-IX-2010 y 23-IX-2010.

a. Con la documentación incorporada a este expediente se ha comprobado que la señora Piche Osorio, mediante el escrito presentado el 16-IX-2010, le requirió al aludido Ministro realizar la evaluación de los niveles de contaminación del agua en las tuberías del polígono 43, casa 13, Villa Burdeos, Ciudad Versailles, así como efectuar la inspección del estancamiento de aguas, la contaminación de la tierra y la evaluación de gases en las tuberías de aguas negras y lluvias, petición que fue reiterada mediante el escrito de fecha 22-IX-2010, presentado el 23-IX2010. ...

b. Ahora bien, de la lectura de las referidas notas se advierte que se resolvió parcialmente la petición formulada por la actora, ya que se omitió hacer mención de los posibles niveles de contaminación del agua en las tuberías de dicha vivienda y la evaluación de gases solicitada en las tuberías de aguas negras y lluvias,

por lo que existe una incongruencia omisiva entre lo que fue requerido y lo resuelto por el citado Ministro.

No obstante, si bien la anterior omisión ha incidido negativamente en el derecho de petición de la pretensora, no se ha demostrado que haya afectado su derecho de acceso a la información, puesto que, por un lado, los resultados de los mencionados estudios fueron rendidos a la señora Piche Osorio en un plazo razonable con posterioridad a la toma de las respectivas muestras --seis días para el primer estudio y diecinueve días para el segundo-- y, por otro, no se ha comprobado que existan en poder del Ministro del MARN estudios o datos relativos a los posibles niveles de contaminación del agua en las tuberías de la aludida vivienda o evaluaciones de gases de las tuberías de aguas negras y lluvias, por lo que no podría colegirse que dicha autoridad se haya negado a proporcionarle a la peticionaria la información requerida con relación a tales circunstancias.

c. En consecuencia, con base en la prueba anteriormente detallada se ha acreditado que *el Ministro del MARN vulneró el derecho de petición de la señora Domitila Rosario Piche Osario, pues las delegados de dicha autoridad resolvieron parcialmente lo solicitado por la referida señora, sin que ello haya implicado una transgresión a su derecho de acceso a la información, por lo que es procedente desestimar este último aspecto concreto de la pretensión incoada.*

VI. Determinadas las transgresiones constitucionales derivadas de las omisiones de las autoridades demandadas, corresponde establecer el efecto restitutorio de esta sentencia.

1. La ley ha preceptuado en el art. 35 de la L. Pr. Cn. lo que la jurisprudencia constitucional ha denominado "efecto restitutorio", estableciéndolo como la principal consecuencia de una sentencia estimatoria del proceso de amparo. Esta opera cuando se ha reconocido la existencia de un agravio a la parte actora de dicho proceso y mediante su aplicación se pretende reparar el daño causado, ordenando que las cosas vuelvan al estado en que se encontraban antes de la ejecución del acto inconstitucional. Aunado a ello, la mencionada disposición legal señala que, en los supuestos en que tal acto se hubiere ejecutado en todo o en parte *de un modo irremediable*, habrá lugar a una indemnización de daños y perjuicios a favor de la parte demandante, lo que constituye un "efecto alternativo" de la sentencia de amparo.

2. A. En el presente caso, se ha comprobado que la Viceministra del MARN vulneró los derechos de petición y de acceso a la información de la demandante al haber omitido pronunciarse en un plazo razonable sobre la petición que le fue formulada el 17-IX-2010, consistente en que expidiera certificación de un estudio bioquímico realizado en San Juan Opico, por lo que *el efecto restitutorio material con relación a dicha transgresión constitucional consistirá en ordenar a la aludida autoridad que en el plazo de quince días hábiles, contados a partir de la notificación respectiva, resuelva favorable o desfavorablemente— la petición planteada por la actora.*

B. En otro orden, con relación a las solicitudes formuladas por la pretensora al Ministro del MARN mediante los escritos de fechas 16-IX-2010 y 23-IX-2010, las cuales fueron parcialmente atendidas en las notas MARN-DGGAPN-0354-2010 y MARN-DGGA y PN-UDS941-2011, de fechas 18-II-2011 y 11-V-2011, respectivamente, *el electo restitutorio material respecto a la transgresión al derecho de petición de la actora que se ha constatado en este amparo consistirá en ordenar al referido Ministro que en el plazo de treinta días hábiles, contados a partir de la notificación respectiva, resuelva favorable desfavorablemente— el requerimiento planteado en lo concerniente a realizar la evaluación de los niveles de contaminación del agua en las tuberías de la vivienda en cuestión y de gases de las tuberías de aguas negras y lluvias.*

C Finalmente, en cuanto a la petición formulada por la pretensora al Ministro del MARN mediante el escrito de fecha 27-IX-2010, en el sentido que le entregara certificación del Estudio de Impacto Ambiental del proyecto Ciudad Versailles, San Juan Opico, la cual fue resulta por medio de la nota MARN-DGGA-650-2010, de fecha 19-X-2010, pero que no fue comunicado a la interesada en un plazo razonable, se ha comprobado en este amparo que tal omisión consumó sus efectos de un modo *irremediable, por lo que es imposible efectuar una restitución material de los derechos vulnerados y. en consecuencia, el efecto de esta sentencia se concretará en declarar la infracción a los derechos de petición y de acceso a la información de la pretensora, quedándole expedita la vía indemnizatoria por los daños y perjuicios ocasionadas con la aludida omisión.*

3. A. Con relación a la solicitud planteada por la parte actora en cuanto a que se emita un pronunciamiento sobre el pago de cierta cantidad de dinero en carácter de indemnización de daños y perjuicios, así como costas procesales, el art. 35 inc. 3° de la L.Pr.C.n. prescribe literalmente que: "... [l]a sentencia contendrá, además, la condena en las costas, daños y perjuicios del funcionario que en su informe hubiere negado la existencia del acto reclamado, o hubiese omitido dicho informe o falseado los hechos en el mismo..."

En la resolución de fecha 27-VII-2011, emitida en el Amp. 141-2010, se expresó que la condena que establece el art. 35 inc. 3° de la L.,Pr.Cn. procede ante la presencia de una actuación dolosa de la autoridad demandada y no ante el mero ejercicio de su derecho de defensa. Así, al ser el amparo un proceso contradictorio, la autoridad demandada, siempre y cuando respete los principios generales del proceso, tiene derecho a defender su posición -lo que puede hacer negando hechos, guardando silencio, etc.-, sin que por ello deba ser condenada en costas, daños y perjuicios.

B. En el presente caso, tanto el Ministro como la Viceministra del MARN ningún momento han actuado de mala fe, puesto que no negaron la existencia de las peticiones realizadas, sino que se limitaron a *defender su posición negando los argumentos* planteados por la demandante, orientando sus alegaciones a que esta había obtenido una resolución a sus solicitudes y había accedido a la información que requirió.

De igual forma, dichas autoridades presentaron, durante la tramitación del presente amparo, los informes que les fueron requeridos y, además, intervinieron en cada una de las etapas en las que se les otorgó la oportunidad de emitir los argumentos que estimaran convenientes para ejercer su defensa, sin que haya sido posible determinar que aquellas hayan incurrido en incumplimiento de los principios de veracidad, lealtad, buena fe y probidad procesal.

C Por otra parte, la condena en costas, esencialmente, alude a la compensación de los gastos económicamente cuantificables que las partes han de sufragar como consecuencia directa de la sustanciación del proceso, como por ejemplo: los gastos profesionales de los abogados, peritos y demás profesionales cuya intervención haya sido necesaria para su tramitación, así como la obtención de certificaciones, testimonios u otro tipo de documentos determinantes para la controversia que se soliciten a los registros públicos, salvo que estos se requieran directamente por la autoridad judicial o funcionario que tenga a su cargo el conocimiento de los hechos sometidos a discusión.

En cuanto a este punto es necesario indicar que la L.Pr.Cn. no exige para ningún proceso constitucional actuar por medio de un abogado y, en todo caso, la actora de este amparo tiene esa calidad técnica, tal como consta en el sello impreso en cada uno de los escritos que ella ha presentado, por lo que no ha tenido que sufragar gastos por procuración. Por otro lado, no se evidencia la existencia de otro tipo de desembolsos en que haya podido incurrir la demandante, tales como el pago de peritos u otros profesionales o de certificaciones u otro tipo de documentos.

D. En virtud de lo expuesto, *no se cumplen las condiciones para que se condene en costas, daños y perjuicios, con base en el art. 35 inc. 3° de la L.Pr.Cn. a las autoridades administrativas demandadas y, en consecuencia, deberá desestimarse la petición formulada en ese sentido.*

POR TANTO, con base en las razones expuestas y lo dispuesto en los arts. 6 y 18 de la Cn., así como en los arts. 32, 33, 34 y 35 de la Ley de Procedimientos Constitucionales, en nombre de la República, esta Sala **FALLA**: (a) *Declárase no ha lugar el amparo* solicitado por la señora Domitila Rosario Piche Osorio, conocida por Domitila Rosario Piche Estrada, en contra del Ministro del Medio Ambiente y Recursos Naturales, en virtud de no haberse acreditado que las omisiones atribuidas con relación a los escritos presentados con fechas 16-IX-2010 y 23-IX-2010 hayan implicado una transgresión al derecho de acceso a la información de aquella; (b) *Declárase ha lugar el amparo* requerido por la señora Piche Osorio, en contra de la omisión atribuida al Ministro del Medio Ambiente y Recursos Naturales, con relación a los escritos presentados con fechas 16-IX-2010 y 23-IX-2010, por existir vulneración al derecho de petición de la referida señora; (c) *Declárase ha lugar el amparo* solicitado por la señora Piche Osorio, en contra de las omisiones atribuidas al Ministro del Medio Ambiente y Recursos Naturales y a la Viceministra del Medio Ambiente y Recursos Naturales con relación a los escritos de fechas 27-IX-2010 y 17-IX-2010, respectivamente, por existir vulneración de los derechos de petición y de acceso a la información de aquella; (d) *Ordénase a la Viceministra del Medio*

Ambiente y Recursos Naturales que en el plazo de quince días hábiles, contados a partir de la notificación respectiva, resuelva la petición que le fue planteada por la demandante mediante el escrito de fecha 17-IX-2011, consistente en que le expidiera certificación de un estudio bioquímico realizado en San Juan Opico; (e) *Ordénase Ministro del Medio Ambiente y Recursos Naturales* que en el plazo de treinta días hábiles, contados a partir de la notificación respectiva, resuelva la petición planteada por la actora en los escritos presentados con fechas 16-IX-2010 y 23-IX-2010, en lo concerniente a realizar la evaluación de los niveles de contaminación del agua en las tuberías de la vivienda en cuestión y de gases de las tuberías de aguas negras y lluvias; (f) *Queda expedita a la parte actora la vía indemnizatoria* por los daños y perjuicios ocasionados por el Ministro del Medio Ambiente y Recursos Naturales al no haber comunicado en un plazo razonable lo resuelto en la nota MARN-DGGA-650-2010, de fecha 19-X-2010; (g) *Declarase no ha lugar* la petición de la pretensora referida a condenar al pago de cierta cantidad de dinero en carácter de costas procesales, daños y perjuicios, con base en el art. 35 inc. 3° de la L.Pr.Cn. a las autoridades administrativas demandadas; y (f) *Notifíquese. ...*

3. Ashgar Leghari v. Federation of Pakistan (Lahore High Court, Pakistan, 2015)

CLIMATE CHANGE ORDER.

1. The petitioner, who is an agriculturist and a citizen of Pakistan, has approached this court through this public interest litigation (PIL) to challenge the inaction, delay and lack of seriousness on the part of the Federal Government and the Government of the Punjab to address the challenges and to meet the vulnerabilities associated with Climate Change. It is submitted that in spite of the National Climate Change Policy, 2012 and the Framework for Implementation of Climate Change Policy (2014-2030) ["Framework"], there is no progress on the ground. It is submitted that climate change is a serious threat to water, food and energy security of Pakistan which offends the fundamental right to life under article 9 of the Constitution. On the last date of hearing, notices were issued to the concerned Ministries and Departments for today.

2. The following departments and their representatives are present before the Court today:

Federal Government.

- i. Cabinet Division, Government of Pakistan.
- ii. Ministry of Finance, Revenue and Planning and Development.
- iii. Ministry of Foreign Affairs
- iv. Ministry of Inter-Provincial Coordination.
- v. Ministry of Law and Justice
- vi. Ministry of Climate Change.
- vii. Ministry of National Food Security and Research.

- viii. Ministry of Water and Power
- ix. Irrigation Department.
- x. National Disaster Management Authority (NDMA).

Provincial Government.

- i. Agricultural Department.
- ii. Environment Protection Department/EPA.
- iii. Food Department.
- iv. Forestry, Wildlife and Fisheries Department.
- v. Health Department.
- vi. Housing, Urban Development and Public Health Engineering Department.
- vii. Planning and Development Department.
- viii. Irrigation Department.
- ix. Law and Parliamentary Affairs Department.
- x. Disaster Management Department (DMD).
- xi. PDMA.

Joint Secretary, Ministry of Climate Change made his submissions regarding the implementation of the Climate Change Framework. He submitted that under the Framework there are 734 action points to be addressed by various stakeholders and out of these 232 action points, are priority items which must be completed in two years i.e., latest by 2016. In response to a question by the Court, the Joint Secretary submitted that the principal concern for Pakistan is to develop climate change resilience through adaptation in Water, Agriculture & Livestock and Forestry sectors besides Disaster Preparedness. He referred to Paras 4, 5, 7 and 9 of the Framework in this regard.

3. He submitted that Federal Ministry for Climate Change was established in the year 2015 and its first meeting took place in April, 2015 and since then various reminders have been issued to various departments and authorities in May and June, 2015 to report the progress regarding the priority items mentioned in the Framework. On Court query, he very frankly submitted that by and large the response of the various departments has not been very positive and feels that more awareness and sensitization is required. He submits that the effects of climate change can be addressed through mitigation or adaptation. As Pakistan is not a major contributor to global warming it is actually a victim of climate change and requires immediate remedial adaptation measures to cope with the disruptive climatic patterns.

4. It is submitted that most relevant stakeholders at the Federal level are the Ministry of Water and Power, the Federal Flood Commission, Meteorological Department, WAPDA and NDMA [National Disaster Management Authority], Economic Affairs Division, Planning Commission of Pakistan and at the provincial level it is the Planning and Development (P&D) Department, Irrigation (including Small Dams Organization), Agriculture and Forestry Departments besides PDMA. He also submits that MET Department be directed to be present before this Court with a summary of the climatic history of Pakistan for the benefit of the Court and for the other stakeholders.

5. The representatives of the Irrigation Department, Agriculture Department, Forestry Department, Ministry of Water and Power, Federal Flood Commission, NDMA, PDMA and Ministry of Foreign Affairs made brief submissions but could not satisfactorily show that adaptation measures as listed in the Framework were seriously afoot. They sought time to file a detailed reply clearly showing the progress made regarding the PRIORITY actions under the Framework relating to Water, Agriculture, Forestry and Disaster Management.

6. Climate Change is a defining challenge of our time and has led to dramatic alterations in our planet's climate system. For Pakistan, these climatic variations have primarily resulted in heavy floods and droughts, raising serious concerns regarding water and food security. On a legal and constitutional plane this is clarion call for the protection of fundamental rights of the citizens of Pakistan, in particular, the vulnerable and weak segments of the society who are unable to approach this Court.

7. Fundamental rights, like the right to life (article 9) which includes the right to a healthy and clean environment and right to human dignity (article 14) read with constitutional principles of democracy, equality, social, economic and political justice include within their ambit and commitment, the international environmental principles of sustainable development, precautionary principle, environmental impact assessment, inter and intra-generational equity and public trust doctrine. Environment and its protection has taken a center stage in the scheme of our constitutional rights. It appears that we have to move on. The existing environmental jurisprudence has to be fashioned to meet the needs of something more urgent and overpowering i.e., Climate Change. From Environmental Justice, which was largely localized and limited to our own ecosystems and biodiversity, we need to move to Climate Change Justice. Fundamental rights lay at the foundation of these two overlapping justice systems. Right to life, right to human dignity, right to property and right to information under articles 9, 14, 23 and 19A of the Constitution read with the constitutional values of political, economic and social justice provide the necessary judicial toolkit to address and monitor the Government's response to climate change.

8. In the present case, the delay and lethargy of the State in implementing the Framework offends the fundamental rights of the citizens which need to be safeguarded. Therefore, it is directed as follows:

- i. That above Ministries, Departments and Authorities shall nominate a CLIMATE CHANGE FOCAL PERSON within their institution to closely work with the Ministry of Climate Change to ensure the implementation of the Framework and also assist the Court in the instant petition. The official notification for the said nomination shall be placed on record on the next date of hearing when the FOCAL PERSON shall also appear before the Court.

ii. The above Ministries, Departments and Authorities shall present a list of adaptation action points (out of the priority items of the Framework) that can be achieved by 31st December, 2015.

iii. In order to assist this Court to monitor the progress of the Framework according to the deadline directed by the Court (i.e., 31st December, 2105) it is imperative to constitute a CLIMATE CHANGE COMMISSION (CCC). CCC shall comprise (a) representatives of the key ministries/departments (b) NGOs (c) Technical Experts etc. Let the proposed names and terms of reference be placed on the record on the next date of hearing.

The Joint Secretary Climate Change when asked to appear in person on the next date of hearing, submitted that he has been transferred to Baluchistan and he might not be able to assist the Court on the next date of hearing. On further probe, the said officer replied that he has been working in the areas of Environment/ Forestry and Climate Change for the last four years. On a policy level, if a civil servant has acquired such special expertise and experience over a period of four years especially in an area where the country lacks expertise and where water and food security stand seriously threatened, any such transfer can weaken the momentum gained by the Ministry which in turn will have a serious bearing on the fundamental rights of the people. Learned DAG will seek instructions from the Establishment Division in this regard and apprise the Court on the next date of hearing. The said officer shall appear in person on the next date of hearing.

9. Office shall issue notices to:

i. Mr. Ali Tauqir Sheikh, CEO, LEAD Pakistan, LEAD HOSUE, f-7, Markaz Islamabad (051-111 511 111).

ii. Mr. Hamad Naqi, Director General, WWF, Lahore (0300-8466690)

iii. Mr. Irfan Tariq, D.G. (Environment), Ministry of Climate Change, Islamabad.

iv. The Project Director, Small Dams Organization, Irrigation Department, Government of the Punjab.

10. Office is directed to additionally fax copy of this order to all the concerned departments and persons mentioned in this Order. Additional Secretaries of the Ministries and Departments mentioned in this order shall appear in person along with the FOCAL PERSONS on the next date of hearing.

11. To come up on 14.09.2015 at 11.00 a.m.

(Syed Mansoor Ali Shah)
Judge

M. Tahir*

4. Gbemre v Shell Petroleum Development Company Nigeria Limited and Others, Federal High Court, Nigeria (2005)

AHRLR 151 (NgHC 2005)

(Mr Jonah Gbemre (for himself and representing Iwherekan Community in Delta State, Nigeria) v Shell Petroleum Development Company Nigeria Ltd, Nigerian National Petroleum Corporation and Attorney-General of the Federation)

Federal High Court of Nigeria in the Benin Judicial Division, suit FHC/B/CS/53/05, 14 November 2005

Judge: Nwokorie

[1.] On 21 July 2005 this Court granted leave to the applicants to apply for an order enforcing or securing the enforcement of their fundamental rights to life and dignity of human person as provided by sections 33(1) and 34(1) of the Constitution of the Federal Republic of Nigeria, 1999, and articles 4, 16 and 24 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Cap A9 vol 1, Laws of the Federation of Nigeria, 2004. By a further leave of Court I permitted the applicant to commence these proceedings for himself and as representing other members, individuals and residents of Iwherekan community in Delta State of Nigeria, in view of the copious unwieldy list of members contained in an earlier application for leave they brought in respect thereof, which was withdrawn by their counsel at the prompting of the Court.

[2.] The reliefs claimed by the applicants in their subsequent motion on notice filed on 29 July 2005 include:

1. A declaration that the constitutionally guaranteed fundamental rights to life and dignity of human person provided in sections 33(1) and 34(1) of the Constitution of Federal Republic of Nigeria, 1999 and reinforced by articles 4, 16 and 24 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, cap A9, vol1, Laws of the Federation of Nigeria, 2004 inevitably includes the right to clean poison- free, pollution-free and healthy environment.

2. A declaration that the actions of the 1st and 2nd respondents in continuing to flare gas in the course of their exploration and production activities in the applicant's community is a violation of their fundamental rights to life (including healthy environment) and dignity of human person guaranteed by sections 33(1) and 34(1) of the Constitution of Federal Republic of Nigeria, 1999 and reinforced by articles 4, 16 and 24 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, cap A9, vol1, Laws of the Federation of Nigeria 2004.

3. A declaration that the failure of the 1st and 2nd respondents to carry out environmental impact assessment in the applicant's community concerning the effects of their gas flaring activities is a violation of section 2(2) of the Environment Impact Assessment Act, cap E12 vol 6 Laws of the Federation of Nigeria, 2004 and contributed to the violation of the applicant's said

fundamental rights to life and dignity of human person

4. A declaration that the provisions of section 3(2)(a), (b) of the Associated Gas Re-injection Act cap A25 vol 1 Laws of the Federation of Nigeria, 2004 and Section 1 of the Associated Gas Re-Injection (continued flaring of gas) Regulations Section 1.43 of 1984, under which the continued flaring of gas in Nigeria may be allowed are inconsistent with the applicant's right to life and/or dignity of human person enshrined in sections 33(1) and 34(1) of the Constitution of Federal Republic of Nigeria, 1999 and articles 4, 16 and 24 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, cap A9 vol 1 Laws of the Federation of Nigeria, 2004 and are therefore unconstitutional, null and void by virtue of section 1(3) of the same Constitution.

5. An order of perpetual injunction restraining the 1st and 2nd respondents by themselves or by their agents, servants, contractors or workers or otherwise howsoever form further flaring of gas in the applicants said community.

[3.] It is the case of the applicants, as shown in the itemized grounds upon which the above-mentioned reliefs are sought that:

a) By virtue of the provisions of sections 33(1) and 34(1) of the Constitution of the Federal Republic of Nigeria, 1999 they have a fundamental right to life and dignity of human person.

b) Also by virtue of articles 4, 16 and 24 of the African Charter on Human and Peoples' [Rights] (Ratification and Enforcement) Act Cap A9, vol 1 Laws of Federation of Nigeria, 2004, they have the right to respect for their lives and dignity of their persons and to enjoy the best attainable state of physical and mental health as well as right to a general satisfactory environment favourable to their development.

c) That the gas flaring activities in the community in Delta State of Nigeria by the 1st and 2nd respondents are a violation of their said fundamental rights to life and dignity of human person and to a healthy life in a healthy environment.

d) That no environmental impact assessment was carried out by the 1st and 2nd respondents concerning their gas flaring activities in the applicant's community as required by section 2(2) of the Environmental Impact Assessment Act, Cap E 12 vol 6, Laws of the Federation of Nigeria 2004, and this has contributed to the unrestrained, mindless flaring of gas by the 1st and 2nd respondents in their community in violation of their said fundamental rights.

e) That no valid ministerial gas flaring certificates were obtained by any of the 1st and 2nd respondents authorizing the gas flaring in the applicant's said community in violation of section 3(2) of the Associated Gas Re- Injection Act, Cap A25 vol 1, Laws of the Federation of Nigeria, 2004.

f) That the provisions of section 3(2) of the Associated Gas Re-Injection Act, Cap

A25, vol 1, Laws of the Federation of Nigeria, 2004 and section 1 of the Associated Re-Injection (Continued Flaring of Gas) Regulations, 43 of 1984, under which gas flaring in Nigeria may be continued are inconsistent with the provisions of sections 33(1) and 34(1) of the Constitution of the Federal Republic of Nigeria 1999 and articles 4, 16 and 24 of African Charter on Human and Peoples' [Rights] (Ratification and Enforcement) are therefore unconstitutional, null and void.

g) That the provisions of both sections 21(1) and (2) of the Federal Environmental Protection Agency Act (FEPA) Cap F10 vol 1 Laws of the Federation of Nigeria, 2004 makes the gas flaring activities of the 1st and 2nd respondents a crime, the continuation of which should be discouraged and restrained by the Court.

[4.] It is also, in the case of the applicants (as summarised in their affidavit in verification of all the above-stated facts that they are *bona fide* citizens of the Federal Republic of Nigeria [and]

1. That the 1st and 2nd respondents are oil and gas companies in Nigeria who are engaged jointly and severally in the exploration and production of crude oil and other petroleum products in Nigeria.

2. That in further support of their rights to life and dignity of their persons they have the right to respect for their lives and dignity of their persons and to enjoy the best attainable state physical and mental health as well as right to a general satisfactory environment favourable to their development.

3. That the 1st and 2nd respondents have been engaged in massive, relentless and continuous gas flaring in their community and that the 2nd respondent is a joint venture partner with the 1st respondent in its oil exploration and production activities, which includes gas-flaring in Nigeria.

4. That the activities of the 1st and 2nd respondents in continuing to flare gas in their community seriously pollutes the air, causes respiratory diseases and generally endangers and impairs their health.

5. That the 1st and 2nd respondents have carried on gas flaring continuously in their community without any regard to its deleterious and ruinous consequences concentrating only on pursuing their commercial interest and maximizing profit.

6. That the 1st and 2nd respondents do not like to find gas together with oil in their oil-fields (ie associated gas, AG), but prefer to find gas without it being mixed up with oil - so called non-associated gas (non AG), and that the attitude of the 1st and 2nd respondents whenever they find oil mixed with gas is to dispose of the associated gas in order to profit front the oil (which is the more lucrative component) and this process of gas flaring is unrestrained and mindless.

7. That burning of gas by flaring same in their community gives rise to the following: a. Poisons and pollutes the environment as it leads to the emission

of carbon dioxide, the main green house gas; the flares contain a cocktail of toxins that affect their health, lives and livelihood. b. Exposes them to an increased risk of premature death, respiratory illness, asthma and cancer. c. Contributes to adverse climate change as it emits carbon dioxide and methane which causes warming of the environment, pollutes their food and water. d. Causes painful breathing chronic bronchitis, decreased lung function and death. e. Reduces crop production and adversely impacts on their food security. f. Causes acid rain, their corrugated house roofs are corroded by the composition of the rain that falls as a result of gas flaring saying that the primary causes of acid rain are emissions of sulphur dioxide and nitrogen oxides which combine with atmospheric moisture to form sulphuric acid and nitric acid respectively. The acidic rain consequently acidifies their lakes and streams and damages their vegetation.

8. That the emissions resulting from the 1st and 2nd respondents burning of associated gas by flaring in their community in an open uncontrolled manner is a mixture of smoke more precisely referred to particulate matter, combustion by-products including sulphur dioxide, nitrogen dioxides and carcinogenic substances, all of which are very dangerous to human health and lives in particular.

9. That no Environmental Impact Assessment (EIA) whatsoever was undertaken by any of the 1st and 2nd respondents to ascertain the harmful consequences of their gas flaring activities in the area to the environment, health, food, water, development, lives, infrastructure etc.

10. That if the 1st and 2nd respondents had carried out environmental impact assessment in their community concerning this gas flaring as required by law, they would have known or found out that it is most dangerous to their health, life and environment and refrained from gas flaring and that they deliberately failed to do so out of their selfish economic interest.

11. That so many natives of the community have died and countless others are suffering various sicknesses occasioned by the effects of gas flaring by the 1st and 2nd defendants.

12. That their community is thereby grossly undeveloped, very poor and without adequate medical facilities to cope with the adverse and harmful effects on their health and lives occasioned by the unrestrained gas flaring activities in the area.

13. That the 1st and 2nd respondents have not bothered to consider the negative unhealthy and very damaging impact on their health, lives, and environment of their persistent gas flaring activities and have made no arrangements to provide them with adequate medical attention and facilities to cushion the adverse effects of their gas flaring activities.

14. That the constitutional guarantee of right to life and dignity of human person available to them as citizens of Nigeria includes the right to a clean,

poison-free and pollution-free air and healthy environment conducive for human beings to reside in for our development and full enjoyment of life; and that these rights to life and dignity of human person have been and are being wantonly violated and are continuously threatened with persistent violation by these gas flaring activities.

15. That unless this Court promptly intervenes their said fundamental rights being breached by the 1st and 2nd respondents will continue unabated and with impunity while its members will continue to suffer various sicknesses, deterioration of health and premature death.

16. And that the 1st and 2nd respondents have no right to continue to engage in gas-flaring in violation of their right to life and to a clean, healthy, pollution-free environment and dignity of human person.

Finally, that the 1st and 2nd respondents have no valid ministerial certificates authorizing them to flare gas in the applicant's community.

... [5.] Upon a thorough evaluation of all the processes, submission, judicial and statutory authorities as well as the nature of the subject matter together with the urgency which both parties through their counsel have observably treated the weighty issues raised in the substantive claim, I find, myself able to hold as follows (after a thoroughly painstaking consideration):

1. That the applicants were properly granted leave to institute these proceedings in a representative capacity for himself and for each and every member of the Iweherekan Community in Delta State of Nigeria.

2. That this Court has the inherent jurisdiction to grant leave to the applicants who are *bona fide* citizens and residents of the Federal Republic of Nigeria, to apply for the enforcement of their fundamental rights to life and dignity of the human person as guaranteed by sections 33 and 34 of the Constitution of the Federal Republic of Nigeria, 1999.

3. That these constitutionally guaranteed rights inevitably include the right to clean, poison-free, pollution-free healthy environment.

4. The actions of the 1st and 2nd respondents in continuing to flare gas in the course of their oil exploration and production activities in the applicants' community is a gross violation of their fundamental right to life (including healthy environment) and dignity of human person as enshrined in the Constitution.

5. Failure of the 1st and 2nd respondents to carry out environmental impact assessment in the applicants' community concerning the effects of their gas flaring activities is a clear violation of section 2(2) of the Environmental Impact Assessment Act, cap E12 vol 6, Laws of the Federation of Nigeria 2004, and has contributed to a further violation of the said fundamental rights.

6. That section 3(2)(a) and (b) of the Associated Gas Re-Injection Act and

section 1 of the Associated Gas Re-Injection (Continued Flaring of Gas) Regulations section 1.43 of 1984, under which gas flaring in Nigeria may be allowed are inconsistent with the applicant's rights to life and/or dignity of human person enshrined in sections 33(1) and 34(1) of the Constitution of the Federal Republic of Nigeria, 1999 and articles 4, 16 and 24 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, cap A9, vol 1, Laws of the Federation of Nigeria, 2004) and are therefore unconstitutional, null and void by virtue of section 1(3) of the same Constitution.

[6.] Based on the above findings, the reliefs claimed by the applicants as stated in their motion paper as 1, 2, 3, 4 are hereby granted as I make and repeat the specific declarations contained there as the final orders of the Court:

[For relief 1-4, see para. 2 above – eds]

5. I hereby order that the 1st and 2nd respondents are accordingly restrained whether by themselves, their servants or workers or otherwise from further flaring of gas in applicants' community and are to take immediate steps to stop the further flaring of gas in the applicant's community

6. The Honorable Attorney-General of the Federation and Ministry of Justice, 3rd respondent in these proceedings who, regrettably, did not put up any appearance, and/or defend these proceedings is hereby ordered to immediately set into motion, after due consultation with the Federal Executive Council, necessary processes for the Enactment of a Bill for an Act of the National Assembly for the speedy amendment of the relevant sections of the Associated Gas Re-Injection Act and the Regulations made there under to quickly bring them in line with the provisions of chapter 4 of the Constitution, especially in view of the fact that the Associated Gas Re-Injection Act even by itself also makes the said continuous gas flaring a crime having prescribed penalties in respect thereof. Accordingly, the case as put forward by the 1st and 2nd respondents as well as their various preliminary objections are hereby dismissed as lacking merit.

7. This is the final judgment of the Court and I make no award of damages costs or compensations whatsoever.



Chapter 3: Justiciability of Environmental Constitutionalism

"[T]he degradation of the environment and its progressive destruction have the capacity to alter the conditions that have permitted the development of man and to condemn us to the loss of the quality of life, for ourselves and our descendents and eventually the disappearance of the human species."

Colombian Constitutional Court, 2010

"[T]he harms caused to the environment are the grand theme of the twenty-first century, and it is a duty of all to join together so that these harms are prevented, since, once produced, they are as a practical matter, impossible to repair."

Argentina Supreme Court, 2010

"[The Constitution] allows any individual or organization to protect the rights of another even though that individual is not suffering the injury complained of or does not know that he is suffering from the alleged injury. To put it in the biblical sense the Article makes all of us our 'brother keeper.' In that sense it gives all the power to speak for those who cannot speak for their rights due to their ignorance, poverty or apathy. In that regard I cannot hide any pride to say that our constitution is among the best the world over because it emphasizes the point that violation of any human right or fundamental right of one person is violation of the right of all."

Uganda Supreme Court, 2004

This Chapter addresses matters that are central to the justiciability of environmental constitutionalism, including presumptions about justiciability, standing, rights of action, timing, and defenses.

A. Presumptions About Justiciability

Environmental constitutionalism is likely more effective when it is self-executing, that is, when it does not require interceding legislative action. Provisions are more likely to be held to be self-executing when they appear alongside other constitutional rights, for example, in a constitution's "Bill of Rights," or listing of fundamental rights.

The constitutions of the majority of nations that have adopted substantive environmental rights seem to classify them as self-executing. Countries in Central and Eastern Europe have led the way in this regard, including Azerbaijan, Albania, Belarus, Bulgaria, Croatia, Chechnya, Estonia, Georgia, Hungary, Montenegro, Romania, Russia, Moldova, Slovakia, Serbia, Slovenia, and Ukraine. Most countries with constitutional substantive environmental rights in Africa also place them among first generation rights, including Angola, Benin, Burkina Faso, Chad, Congo, Ethiopia, Mali, Niger, South Africa, Sudan, Togo, the island nations of Cape Verde, and Seychelles. Countries in Central and South America to do so include Argentina, Brazil, Ecuador, El Salvador, Guatemala, Honduras, and Venezuela. Other countries that appear to recognize substantive environmental rights as rights of the first order include Belgium and France. Countries in Asia to have done so include Kyrgyzstan and Mongolia. Such structural placement makes it more likely that such provisions are self-executing and enforceable.

Other provisions are written in such a way as to leave little doubt that they are self-executing, enforceable, and subject to redress without the need for intervening state action. Notably, constitutions from the former Soviet Bloc make it clear that affected parties can recover compensation for violations of environmental rights.

Moreover, placing substantive environmental rights within preambles, among general provisions, or in statements of general policy may suggest something other than a self-executing right. Nations that recognize substantive environmental rights in this fashion include Afghanistan, Algeria, Comoros, and Norway. Even though such provisions are usually not justiciable, they can still influence legislative, policy, and judicial interpretation. For instance, while Cameroon's constitution recognizes environmental rights in its Preamble, it also states that the provision is "part and parcel" of the remainder of the constitution.

But the constitutions of some countries are explicit that the right to a quality environment is not self-executing. The two most common variants require interceding state action, or are written so turgidly as to burden enforcement. First, enforceability in some countries seems to be conditioned on state action or implementation, rendering such rights unenforceable until executed by the state. Constitutions written in this vein include Finland ("The public authorities shall endeavor to guarantee for everyone the right to a healthy environment"), Hungary

("Hungary shall recognise and enforce the right of every person to a healthy environment"), Maldives ("Every citizen [has] the following rights pursuant to this Constitution, and the State undertakes to achieve the progressive realisation of these rights by reasonable measures within its ability and resources: . . . (d) a healthy and ecologically balanced environment"), Morocco ("The State, the public establishments and the territorial collectivities work for the mobilization of all the means available [disponibles] to facilitate the equal access of the citizens to conditions that permit their enjoyment of the right . . . to the access to water and to a healthy environment"), Seychelles ("The State recognises the right of every person to live in and enjoy a clean, healthy and ecologically balanced environment"), and Slovenia ("Everyone has the right in accordance with the law to a healthy living environment"). Such wording likely dilutes the efficacy of these rights at inception.

The variety of constitutional provisions, aiming to protect different aspects of the environment with a range of scaffolding and enforcement mechanisms, attests to the growth of environmental constitutionalism throughout the world in the last four decades. But the value of constitutional guarantees is measured not only by their textual manifestations but perhaps even more importantly by the extent to which the rights are vindicable by the nation's courts. Predictions about justiciability tend to follow the same patterns as those pertaining to constitutionalizing environmental rights in the first place.

The proof about justiciability, however, is revealed by examining judicial outcomes themselves. Even when rights have strong textual and structural footing, justiciability is still a "judgment call," especially interpreting provisions that are presumably vague by design. Some courts are more prone to address constitutional environmental rights than others. Thus far, constitutional and apex courts in South America have been the most receptive to constitutional rights to a quality environment. For example, as of this writing, the Constitutional Court of Colombia has rendered at least 135 decisions in which the constitutional right to quality environment is addressed. The Federal Supreme Tribunal of Brazil has addressed its corresponding constitutional environmental rights provision at least 26 times. The Supreme Court of India has addressed environmental protection in a constitutional context more than 80 times since 1975.

B. Who Can Enforce Constitutional Environmental Rights?

Before a court reaches the merits of a constitutional claim, it will often consider the preliminary question of standing, or *locus standi*: whether the party who brought the suit has the right to invoke the court's jurisdiction. Most constitutional traditions have rules about who can initiate litigation, although they vary widely from country to country. Some systems limit who can challenge government action to certain members of the government or to an ombudsman, while others encourage anyone to seek judicial protection. These rules can have a dramatic effect on a nation's legal culture: where standing rules are broad and inviting, more people are encouraged to bring more cases to enforce more laws not only for their own private benefit but for the public good. Conversely, where courts restrict access to judicial fora, as they do typically in the United States, compliance with existing laws, as well as the

progressive realization of constitutional promises, may be seen more as a matter of political discretion than of constitutional obligation. Countries that have broadened the scope of potential litigants, as has happened over the last few decades throughout South America and more recently in France, have seen noticeable increases in environmental constitutionalism.

Constitutional environmental cases challenge conventional standing practices. Even where constitutional review is open to members of the public, it has traditionally been limited to those who can assert well-recognized claims, including claims for harms recognized at common law (such as violations of property rights) or interests specifically identified in statutory provisions. In the United States, standing rules tend to reflect the principle that only individuals who are personally and particularly injured may invoke scarce judicial resources.

Environmental harms, by contrast, affect groups of people generally and similarly. They may affect a whole community or culture or, in the case of climate change, all of humanity. Even where an individual can claim a particular harm—such as, for example, where a toxic leak proves carcinogenic—it is most likely that the plaintiff is not the only person so affected but that a whole community is affected by a greater incidence of cancer; indeed, the plaintiff is more likely to be able to show causation where the defendant's wrongful actions caused a broad-based injury rather than just her own illness. In even more difficult cases, the claim is based on the health not of an individual but of the environment in the abstract and may raise questions about environmental aesthetics or the health of a particular animal population that do not directly affect most people at all.

Some constitutions make the decision for the court, clearly delineating who may sue and who may not, either for all claims or specifically in environmental cases. In Spain, constitutional environmental rights are protected, but they are enforceable only when an ombudsman initiates litigation. This contrasts markedly with the rest of the Spanish-speaking world, which tends to be receptive to constitutional environmental claims. The constitutions of Argentina and Ecuador, for instance, invite any citizen to vindicate such rights, the latter even allowing claims on behalf of nature itself. The Constitution of South Africa, too, adopts an open attitude toward standing, which is buttressed by legislation that reinforces the right of any person to approach the court to assert his or her own interest, the interest of another, or the public interest. The statutory authority to sue extends to suits on behalf of the environment.

The Colombian Constitution as amended in 1991 provides for *tutela* actions, which dramatically enhance access to justice by providing for broad jurisdiction over cases by individuals, with or without lawyers, to enforce fundamental rights. This has become widely used in Colombian courts to vindicate environmental rights, whether under environmental provisions or other provisions relating to the environment, such as the right to life, to dignity, or to health; most of the Colombian cases discussed in this handbook are *tutela* actions, such as those brought by the recyclers for violation of their environmental and livelihood rights, cases brought by residents of an

apartment bloc that was not connected to the city's water system for violation of the right to water, the cases brought by people who lived near an open sewer, and so on. However, where plaintiffs assert collective environmental interests that are grounded not on the health of the claimant but on the harm to the environment, courts have accepted the cases under a separate constitutional writ, the *acción popular*, which permits courts to vindicate diffuse interests. The Mexican constitution was also recently changed to permit diffuse rights including in environmental cases.

In the absence of clear constitutional or statutory rules, a court confronting the question of whether a plaintiff who is not uniquely or particularly affected by defendant's actions can nonetheless sue the defendant must balance competing constitutional values. On the one hand, out of deference to the political process in any constitutional democracy, a court must be wary of allowing challenges to legislative and administrative policies which, after all, may be well reasoned or be required by political or economic exigencies that ought not be easily disturbed or which may require political solutions. This is particularly true in large environmental cases, which often challenge development, or extraction of natural resources or other economic activity, such as in the *La Oroya* case from Peru. Moreover, in principle, decisions taken by political actors are in a democracy remediable in political arenas without the necessity of judicial intervention. And courts may feel that they must protect scarce judicial resources against the flood of litigation that would ensue if the courtroom doors were open to everyone. On the other hand, courts have also recognized that judicial recourse is the last resort to ensure that governments take environmental factors into account or protect the world's most vulnerable people from environmentally-induced injuries.

As far back as 1983, the Argentine courts had recognized "the right of any human being to protect his habitat" in a case seeking to protect the ecological equilibrium with respect to dolphins. The current constitution provides a right to "any person" to "file a prompt and summary proceeding regarding constitutional guarantees ... against any act or omission of the public authorities or individuals which currently or imminently may damage, limit, modify or threaten rights and guarantees recognized by this Constitution" including, expressly "rights protecting the environment." This summary procedure, known as a *tutela* action, may be invoked by "the damaged party, the ombudsman and the associations which foster such ends registered according to a law determining their requirements and organization forms."

The Argentine Supreme Court has interpreted the provision broadly, invoking the diffuse action described by the lower court in the dolphin case. In a 2010 case, the Supreme Court of Argentina invalidated a permit that would have allowed mining in a UNESCO Natural Heritage Site on the basis of a diffuse *tutela* action brought under Section 43 of the Argentine Constitution. The Court explained the rationale for giving effect to the provision in these terms:

The environmental *tutela* reinforces the duties that each citizen has for the care of the rivers, the diversity of the flora and fauna, the nearby soil, the atmosphere. These duties are the correlation that the same citizens have to enjoy a healthy environment, for themselves and for

future generations, because the harm that an individual can cause to the collective good is a harm to himself. The improvement or degradation of the environment benefits or harms the whole population, because it is a good that belongs to the social and trans-individual sphere, and it is from here that the judges derive the particular energy to give effect to these constitutional commands.

In the Philippines, the Supreme Court has developed a set of “Rules Of Procedure For Environmental Cases” that encourage the vindication of constitutional and other environmental rights in extraordinary ways. Among its provisions are the authorization for citizen suits that can be brought by “Any Filipino citizen in representation of others, including minors or generations yet unborn,” (at Rule 2, s. 5); the authorization for the issuance of a Temporary Environmental Protection Order (Rule 2, s. 8); the requirement that courts “prioritize the adjudication of environmental cases” and decide them within one year from the filing of the complaint (Rule 4, s. 5); and protections against Strategic Lawsuits Against Public Participation, which are designed to thwart vindication of environmental rights (Rule 6).

Importantly for environmental rights, the Philippine Rules provide for consideration of cases brought on behalf of nature, known as the “writ of Kalikasan.” Such a writ can be pursued on behalf “of persons whose constitutional right to a balanced and healthful ecology is violated, or threatened” by a public official or private entity, “involving environmental damage of such magnitude as to prejudice the life, health or property of inhabitants in two or more cities or provinces.” (Rule 7, s. 1). The writ petition is filed without docket fees, and within 3 days of filing in the Supreme Court or Court of Appeals, the court must decide whether to issue the relief sought, which consists of either an ocular inspection of the relevant place or the production or inspection of documents or things. The writ has already been used in several high-profile cases involving issues ranging from the development of genetically modified foods to metallic ore mining.

Many courts, like the Filipino Court, have expanded standing in environmental suits upon recognizing the monumental challenge of environmental protection. The Indian Supreme Court has put it this way: “Experience of the recent [past] has brought to us the realization of the deadly effects of development on ecosystem. The entire world is facing a serious problem of environmental degradation due to indiscriminate development. Industrialization, burning of fossil fuels and massive deforestation are leading to degradation of environment.” The Colombian Constitutional Court has expressed concern about the environment even more starkly: “[T]he degradation of the environment and its progressive destruction have the capacity to alter the conditions that have permitted the development of man and to condemn us to the loss of the quality of life, for ourselves and our descendents and eventually the disappearance of the human species.”

In Latin America, constitutional and statutory provisions have encouraged courts to expand standing for environmental cases even to those who cannot show a direct

and individual injury; in India and its neighbors, courts have had to infer broad standing from legal and cultural norms. But in both of these regions, as well as in some other countries around the world, the commitment to opening the courthouse doors to environmental claimants is well established.

The notion that the protection of the environment is a collective good justifies the broad standing rules that permit *any* citizen to sue for a harm done to the whole society. As the Chilean Court said in the landmark *Trillium* decision:

The right to live in an environment free of contamination is a human right of Constitutional hierarchy, which presents a double character: public subjective right and public collective right. The first aspect means that its exercise corresponds, as provided in article 19 of the Political Constitution, to all persons, being the duty of the authority through the regular legal suits and through the constitutional protection claim to protect that right. And regarding the second aspect, the right to live in an environment free from contamination is meant to protect social rights of a collective character, whose defense is the interest of the community as a whole, in the local level as well as in the national level, to all the country, because the very basis of the existence as a society and as a nation are comprehended, and due to the fact that in damaging or limiting the environment and natural resources, the possibilities of life and development of the present and future generations are also limited. In this sense, the safekeeping of these rights are in the interest of the whole society, because it affects to a plurality of parties that are placed in the same factual situation, and whose damage, despite the fact that it carries an enormous social harm, does not cause a meaningful damage clearly appreciated in the individual realm.

This trend is replicated in courts throughout Latin America, where constitutional texts have already lowered standing barriers by allowing any injured person to vindicate his or her constitutional rights in protective or *amparo* or *tutela* actions; it is not, in these countries, such a large step to extend the right to suit to persons who seek to vindicate the diffuse rights of a community or of the whole society. In Peru, the constitution does not explicitly mention the right to bring collective environmental actions but the Constitutional Procedure Code does. Likewise, in Ecuador, the *amparo* law permits collective actions to protect the environment (including that of indigenous communities), though here environmental rights are amplified by the protection of the rights of nature, which by definition are enforceable by people who are generally affected and who claim the rights not on behalf of themselves but of nature itself.

In other Latin American countries, courts have read the combination of substantive protection for the environment and a commitment to ecological values on the one hand and broad standing provisions on the other to permit diffuse actions. The Costa Rican Constitutional Chamber, for instance, has held that “even though a direct and clear suit for the claimant does not exist ... all inhabitants suffer a

prejudice in the same proportion as if it were a direct harm,” such that a claimant may seek to protect the right “to maintain the natural equilibrium of the ecosystem.”

In Asia, the judicial creativity and commitment to environmental protection and sustainable development has made up for the omissions in the constitutional texts. The principle of broad and diffuse standing was pioneered by the Indian Supreme Court in the 1970s in the form of Public Interest Litigation (PIL), but has since spread to neighboring countries as well as some African nations.

PIL was a deliberate effort by the Indian court to expand the bounds of standing beyond the familiar private right of action that would normally be recognized in a common law court to vindicate a private interest. PIL has proven to be extremely important in a wide variety of socio-economic cases, but it is a particularly useful construct for the vindication of environmental rights because it recognizes not only that environmental harms affect society generally, but that they tend to exert particular pressure on the most vulnerable segments of society. These claims are often based on the environment as it provides access to water, arable land, shelter for the world’s poorest people, and to the essentials to sustain a certain quality of life, including individual dignity, a cohesive community, and life itself. They are brought on behalf of the world’s poorest people because people with means can often purchase immunity from environmental degradation: they can live in neighborhoods that are not used as landfills, they have sufficient access to medical care to be buffered from the worst health effects of industrial air pollution, they can access food and water from sophisticated infrastructures in global markets, and they do not depend on the nearby rivers remaining clean for their sustenance.

Proving that the complained-of injury resulted from the action of the defendant can be both costly and time-consuming. Most legal services agencies throughout the world are experienced in asserting immediate and direct claims on behalf of their clients (e.g., accessing medical care or social benefits), but environmental litigation entails different and often more complex and more elaborate types of litigation. In one case, the Bangladeshi Supreme Court thanked the Bangladeshi Environmental Lawyers Association (BELA), an environmental NGO, not only for elucidating the issues, but for bringing the case in the first place and particularly for bringing a constitutional claim challenging the government’s failure to act.

As the Sri Lankan court has said: “Such action would be for the betterment of the general public and the very reason for the institution of such action may be in the interest of the general public.” PIL has a strong normative ethos of social justice. It promotes a transformative agenda by encouraging marginalized members of the political community to assert rights embodied even in the constitution’s aspirational promises.

Broad standing is also invariably tied to the commitment to rule of law, in that it encourages holding public officials accountable for compliance with constitutional rules and norms. Indeed, it can have a transformative impact because it encourages

citizens to engage in public policymaking ensuring that each person has a stake in major decisions made by the government that affect the population.

Taking public interest and diffuse standing doctrines one step further, a few courts have allowed suits on behalf of people not yet living and on behalf of nature itself. If the purpose of these doctrines is to protect the interests of those who (or that) cannot protect themselves, then extending standing in this way is not illogical. In *Comunidad de Chañaral v. Codeco Division el Saldor*, the Chilean Supreme Court held that a farmer had standing to enjoin drainage of Lake Chungarà, recognizing that with environmental damage “future generation[s] would [challenge] the lack of [foresight] of their predecessors if the environment would be polluted and nature destroyed” And in *Oposa v. Factoran*, the Philippine Supreme Court recognized intergenerational standing—that is, the right of an individual to sue on behalf of future generations—although it did so on the basis of pre-existing norms as much as constitutional right. The Court explained that “even before the ratification of the 1987 Constitution, specific statutes already paid special attention to the ‘environmental right’” of the present and future generations, citing two policies that articulate a goal of “fulfil[ling] the social, economic and other requirements of present and future generations of Filipinos.” “As its goal,” the court said, “it speaks of the ‘responsibilities of each generation as trustee and guardian of the environment for succeeding generations.’”

Although its actual effectiveness may be debated, intergenerational standing is useful in cases where the environmental damage is long-term and grows over time such that future generations are more threatened by irreversible and irremediable damage than the present one, even for actions taken presently.

Indeed, in certain cases, the problem of intergenerational standing is less challenging than the problem of international standing. While some environmental violations are felt locally, the consequences of others do not stop at national boundaries, which do limit the jurisdictions of constitutions and constitutional courts. This is particularly salient with challenges based on climate change, whose effects are felt not only across time but across space as well, and it is particularly true where, as noted above, the harm is felt primarily not only to individuals, but also to other species of flora and fauna and essentially to the environment itself. International standing may be available in courts that accept universal jurisdiction, but no court has yet done so in an environmental or climate change case.

The problem of standing also relates to the definition of a cognizable injury: lowering the threshold for standing almost invariably recognizes broader types of harms. Where a plaintiff’s property or health is impaired by reason of the defendant’s environmental degradation, standing is clear in large part because the injury is easily recognizable to a common law or civil court. But a court may be less likely to find standing where the claimed injury is that the rivers and forests are no longer as pristine as they once were, or that once-potable water has become contaminated, or that thousands of acres of previously arable land have become desert. These diffuse claims not only open the courthouse doors to more numerous and more different classes of plaintiffs, but require judicial recognition of more diverse types of injuries.

C. Who is Responsible?: Identifying the Appropriate Defendant

In constitutional environmental cases, standing is the most significant hurdle for litigants to surmount as they attempt to invoke a court's jurisdiction, though defendants will often try to dismiss claims on other grounds as well to prevent a court from ever reaching the merits. One common strategy is to assert that the defendant cannot be held liable for the injuries complained of.

In the simplest constitutional cases, defendants are state actors—members of the executive branch or, less frequently, the legislature or even a court—all of whom are normally obligated to comply with constitutional mandates. In most situations, it does not matter whether the government was acting as sovereign, as regulator, as licensor, as a participant in the market, or in any other capacity since its constitutional obligations are the same. In federal systems, the local (state or provincial) government may be liable instead of or in addition to the central authorities; this is particularly common in situations involving water because of the joint responsibility that different levels of government often have for joint management of water resources. Under the theory of horizontal application that operates in some constitutional systems, private parties may also be held accountable for violation of constitutional norms.

In Colombia, the constitutional court found that a private landowner whose commercial pig farm created an environmental nuisance that injured her neighbor was obligated to conform to the constitutional requirements for environmental protection. The court explained that because each person has a right to not be bothered by environmental intrusions into her home, it cannot be said that the exercise of a commercial activity can be exercised to the detriment of his or her neighbor's rights, given the inactivity of the officials charged with controlling such situations. In that case, the suit was brought against the municipality and the remedy ran against the government officials who were ordered to cease the offending commercial activity but the burden was directly felt by the private entrepreneur whose actions caused the environmental violation.

Horizontal application of constitutional obligations is useful in environmental litigation because a court may be more likely to find liability against a private party than against the government, both because separation of powers principles tend to protect government actors, and because in most cases the private party's action (e.g. the cutting down of the forests or the mining) is more likely to be the direct cause of the environmental degradation than is the government's decision to authorize the private party's action or its failure to protect against it. Aside from liability, a court may be more likely to award damages against a private defendant than against a government defendant, as the latter is likely to be protected against damage awards by sovereign immunity and, in any event, may be less likely to comply with a court order.

D. Timing: When is the Right Time to File a Claim?

Typically, a constitutional violation occurs *after* a defendant's actions have caused a cognizable harm to a defined cohort of individuals who are the intended beneficiaries of the constitutional right. But the precise timing of an environmental injury often makes it difficult to determine when a claim may be brought. This is perhaps a question of the definition of the right: Is the constitutional right to a healthy environment violated any time a governmental policy throws out of balance the "rhythm and harmony" of nature? Or is the triggering action when there is a showing of harm to the environment—that is, when the river is polluted or the forest is cut? Or perhaps before the harm occurs, when the government issues the permit or allows the development project? Or perhaps after the injury has become evident and can be quantified? Or all of the above? Most courts would require at least some action on the part of the defendant to have taken place, and many courts will require more.

These questions may be closely linked to standing. Standing normally requires that the plaintiff prove that the injury is actual or imminently threatened; courts will typically not recognize a cause of action if the harm is speculative or conjectural because there is no basis for holding a defendant liable for harm that she or he has not yet caused. At that point, there is nothing for the defendant to be responsible for and predicting the harm is far too speculative: will the plaintiff actually become ill, how severely, how much treatment will cost, how long will it last, and so on? Even where diffuse standing is accepted, it can be challenging for plaintiffs' groups to prove *in advance* even by a preponderance of the evidence how widespread an adverse health effect will be or how devastating to the community it will be when it strikes. Thus, a court may be less likely to accept a suit where the plaintiff's physical condition is not at present compromised. Similar problems arise where the plaintiff's claim of *future harm* is based on the right to life, dignity, property, or some other human right.

In cases claiming harm to the environment—as opposed to claims of harm to individuals or communities—courts have recognized the need to act *before* the damage occurs and many have shown particular solicitude to claims of *threatened* environmental damage. In the Argentine case that sought to protect against threats to a UNESCO world heritage site, the court reiterated (from a previous case) the conviction that "the harms caused to the environment are the grand theme of the twenty-first century, and it is a duty of all to join together so that these harms are prevented, since, once produced, they are as a practical matter, impossible to repair." As a result, the court continued, no one can have a right to compromise public health and bring death and harms to neighboring residents by the use of their property or, specifically, by the practice of a profession or industry. In a Turkish administrative case, the court cancelled a license for gold processing before it even went into effect, upon finding that it "would operate at a risk which, if materialised, would certainly directly or indirectly impair human life due to the resulting damage to the environment." Implicitly or explicitly, many courts entertaining constitutional environmental claims have adopted the precautionary principle, which permits the vindication of rights before harm has been done on the assumption that if it were to occur, the harm might be devastating to humans or nature and would likely be irreversible.

At the other end of the timeline, environmental claims may sometimes be brought too late. This could occur where the harm caused by the environmental violation is not known, such as where, for instance, dumping or mining contributes to increased cancer rates in a community. In these cases, courts may be leery of accepting such claims if the evidence of the violation has disappeared or dissipated, if corporate control over the defendant has changed making assessment of liability difficult, or if the applicable statute of limitations has run.

E. Justiciability and Process

Many constitutional and other apex courts have also varied some other procedural requirements for the purpose of facilitating the vindication of environmental rights. Most of these variations apply in environmental rights cases generally, regardless of whether the source of the right asserted lies in the constitution or elsewhere.

For example, the Philippine Rules of Procedure in Environmental Cases explicitly adopts the precautionary principle as a matter of evidence, explaining that: “When there is a lack of full scientific certainty in establishing a causal link between human activity and environmental effect, the court shall apply the precautionary principle in resolving the case before it. The constitutional right of the people to a balanced and healthful ecology shall be given the benefit of the doubt. ”The rules also broadly define the types of evidence that may be admissible in environmental cases: “Photographs, videos and similar evidence of events, acts, transactions of wildlife, wildlife by-products or derivatives, forest products or mineral resources subject of a case shall be admissible when authenticated by the person who took the same, by some other person present when said evidence was taken, or by any other person competent to testify on the accuracy thereof.” As a result, the absence of proof of particular harm does not typically preclude a cause of action or the finding of a violation, given the consequences of failing to protect the environment. The Colombian court has been emphatic on this point as well: it has upheld a set of reforms that permit the pre-emptive confiscation of property that would be used to harm the environment, even in the absence of scientific certainty of the damage, noting that the ill effects, harms, risks, and dangers that the environment faces guide the interpretation of constitutional environmental rights. In that case, upholding the regulations ensured that the respective authorities had the necessary means to protect the environment. In south Asia, the principle has also been broadly recognized: in one case from Sri Lanka, the court ordered an environmental impact statement for a mining enterprise, noting that “if ever pollution is discerned, uncertainty as to whether the assimilative capacity has been reached should not prevent measures being insisted upon to reduce such pollution from reaching the environment.”

This concern for the environment sometimes leads to the suspension of other procedural rules. The Argentine court, for instance, put to one side “the ancient concepts of the burden of proof,” ordering the mining companies seeking a permit to prove that their activities would not cause environmental damage. The court also noted that because environmental harms often elude certitude that it would accept

probabilistic evidence of harm to allow the case to proceed. Indeed, it has been noted that throughout Argentina, “a theory developed in the last decades [that] has changed the traditional rule that plaintiff bears the main burden of proof. According to it, the party required to prove or disprove a given fact is the one which is in a better situation to do so. On these grounds, important companies who are defendants are often placed in the need to prove their defenses, while individual plaintiffs may offer little or no evidence (and are not subject to perjury sanctions when they lie),” according to a report on Argentine diffuse and collective rights.

Such probabilistic elasticity seems to apply in a broad array of situations but when invoked in environmental cases, it can be particularly helpful in two ways. Leaving the burden of production with the plaintiff deters litigation, increases the cost on plaintiffs of maintaining litigation, and makes success less likely simply because of the difficulty of amassing sufficient evidence to prove the existence of or potential for harm to humans or nature. Shifting the burden may in some cases dramatically reduce these obstacles. In addition, shifting the burden of persuasion to the defendant also makes it substantially easier for the plaintiff because the defendant’s obligation to persuade a court that no harm will ensue from its activities may be much more onerous than showing the potential for some harm. This can be seen, for instance, in the Ecuadorian case vindicating the rights of nature, where the court imposed on the defendant the obligation to prove that road construction did not harm the environment, an obligation that the government could not satisfy.

In other cases, courts have removed even more specific barriers that could impede the vindication of environmental rights. The Ugandan High Court has inferred from the Constitution’s broad standing the dilution of certain procedural requirements in order to permit a suit to proceed. The court inferred that the ordinary rule that defendants have 45 days in which to respond to a constitutional complaint “cannot apply to a matter where the rights and freedoms of the people are being or are about to be infringed.” The right at issue in that case was the environmental right “to a clean and healthy environment” that would be violated if the government allowed chimpanzees to be exported to China. Despite these concessions, though, the costs of litigation can still be a significant deterrent for many putative plaintiffs.

F. Affirmative Defenses

Jurisdictional limitations, as between federal and subnational courts, like rules governing venue may frustrate efforts to pursue claims. Even if jurisdiction is accepted, most constitutional defenses and limitations apply similarly in substantive environmental rights litigation. State and non-State defendants may assert the usual factual defenses (e.g. that they did not do the complained-of action, or that their actions or omissions did not cause the complained-of injury) and legal defenses (e.g., that their actions or omissions did not violate any legal duty imposed by the constitution). Legal objections may be particularly pertinent where the fundamental environmental right falls under a directive principle of state policy and is therefore formally judicially unenforceable. As we have seen, however, even in these situations, some courts have overcome this objection by finding that the

unenforceable environmental right appertains derivatively to another enforceable right, such as the right to life or to health.

In most constitutional systems, environmental rights are not absolute and may be limited or overcome in at least three situations, all of which pertain equally to the enforcement of other constitutional rights. First, the right may be limited if it conflicts with another right, such as the right to life or a non-derogable right like the right to dignity. As we have seen, however, in some cases, the court's concern for the environment overrides even seemingly compelling human interests, as happened, for instance when a Colombian court held that the health of a disabled man, which improved through animal therapy with a parrot, had to yield to the environmental interest in protecting wild birds. In an Israeli case involving the provision of water to residents of illegal desert settlement, the court tried to "find the balance between the demand for keeping the law and its appropriate enforcement and the concern for a person's basic and existential need for water, even if he does not abide by the law." The positive law that controls judicial discretion rarely identifies how competing interests should be balanced.

Second, the environmental right, like other rights, is almost always subject to a limitations clause or a proportionality test. The South African Constitution, for instance, states that: "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors..." Thus, Parliament could restrict environmental rights if necessary to protect human dignity or equality such as, for instance, where the government develops electrical or water infrastructure that benefits the ability of people to live in dignity though at the same time impairing the natural environment. This could happen, too, where the right to work is pitted against environmental interests. Likewise, even where a constitution is not explicit on the topic, most constitutional rights are subject to a proportionality test, so that an environmental right may be limited in proportion to a particularly strong need. The requirement of proportionality is especially relevant in environmental litigation where balancing is almost intrinsic: a timber permit that harms the environment may nonetheless be permitted if its scope is appropriate to the need. In South Africa, for example, the court has limited vindication of some socio-economic rights where the infringement is "reasonable" in light of all the relevant factors.

Third, courts may decline to vindicate environmental interests if they are deemed to be not an individual right, but an obligation on the State. Thus, a court may order the government to develop a plan for environmental protection, but will not find that a government or private actor has violated a particular plaintiff's right to a healthy environment. Sometimes, this precludes the cause of action; other times, as will be discussed in the next chapter, it dictates the form of remedy.

In each of these situations, environmental rights are limited by other considerations. A counterexample is found in a rule of decision used in some courts of "in dubio pro

natura," which means that when in doubt or when equities are balanced evenly, a court must defer to the decision that upholds environmental rights).

Plaintiffs seeking to enforce constitutional rights face a number of hurdles just getting and staying in court. Defendants have many opportunities to petition courts to dismiss cases for reasons having to do with the identity of the parties, the timing, or simply because the plaintiffs lack adequate proof of the injury they seek to remedy. While adhering to the general principles that govern litigation throughout the world, many courts have nonetheless found ways to encourage plaintiffs to bring constitutional environmental claims by shifting, bending, or outright ignoring certain rules out of an appreciation for the important values at stake in such litigation - the potential cost to humans and to the environment itself of doing nothing and the likely irreversibility of environmental damage. In many cases, the authority for doing so comes not from the constitution itself but from common law principles relating to environmental law. Even so, once plaintiffs have effectively invoked judicial authority, the challenges to obtaining a remedy and having it enforced are enormous.

G. Reference Materials

The *Expediente Sobre Permisos De Minerías a Cielo Abierto en Los Sitos de la UNESCO* (Argentina, 2010) decision that follows places justiciability issues into further context.

1. Expediente sobre permisos de mineras a cielo abierto en los sitios de la UNESCO (Argentina, 2010)

Tribunal: Superior Tribunal de Justicia

Competencia: Recursiva

El Dr. Tizón, dijo:

Las Dras. Alicia Chalabe y Noemí Cazón, en representación de habitantes vecinos de la localidad de Tilcara, departamento del mismo nombre, promovieron el 1º de Agosto de 2.008 “acción de amparo en contra del Estado Provincial a efectos de que ordene a la autoridad administrativa correspondiente –Juzgado Administrativo de Minas- abstenerse de otorgar cualquier permiso de cateo y/o exploración y explotación minera a cielo abierto y/o las que utilicen sustancias químicas como cianuro, mercurio, ácido sulfúrico y otras sustancias tóxicas similares en sus procesos de cateo, prospección, exploración, explotación y/o industrialización de minerales metalíferos, especialmente las referidas al uranio y que revoque los concedidos o en trámite, en la zona de la Quebrada de Humahuaca, de esta provincia de Jujuy, estableciendo de esa manera la plena vigencia del “principio precautorio”, consagrado en el art. 4 de la Ley General del Ambiente Nº 25.675, dictada en el año 2.002 que reglamenta el art. 41 de la Constitución Nacional y que dispone que cuando haya peligro de daño grave o irreversible la ausencia de información o certeza científica no deberá utilizarse como razón para postergar la adopción de medidas eficaces, en función de los costos, para impedir la degradación del medio ambiente...” (sic). Fundamentó la parte actora su petición – en principio- en la Declaración de Patrimonio Natural y Cultural de la Humanidad de la Quebrada de Humahuaca efectuada en el mes de julio de 2.003, en París, Francia, para la Organización de Naciones Unidas para la Educación, la Ciencia y la Cultura (UNESCO).

Paralelamente, para “garantizar la efectividad de la tutela judicial requerida”, en razón del deber de preservación establecido en la Constitución Nacional –adujo como la obligación de los ciudadanos y de las autoridades de preservar el medio ambiente para las generaciones futuras, pidió se decreta medida cautelar innovativa, a fin de que con habilitación de días y horas inhábiles necesarios, se ordene a la demandada -Poder Ejecutivo de la Provincia- la inmediata suspensión de los pedidos de cateo y exploración de minerales de 1º y 2º categoría tramitados mediante los expedientes administrativos, que individualizó, pertenecientes al Juzgado de Minas

de la Provincia, correspondientes al Departamento de Tilcara. Además impetró se informe al Tribunal los permisos de cateo y exploración en trámite o solicitados en la zona y suspenda cada uno de ellos, hasta tanto decida la prohibición de la actividad y producción minera en las condiciones referidas en la Quebrada de Humahuaca, comprendida en la Declaración de Patrimonio Natural y Cultural de la Humanidad efectuada por la UNESCO en el año 2.003.

Alegó que la verosimilitud del derecho que invocó para la cautelar pedida, en el caso se encuentra en la propia esencia, entendió, del derecho ambiental vulnerado, pues requiere de un obrar esencialmente cautelar o precautorio, acorde con el “explícito ropaje” constitucional de los derechos de incidencia colectiva, dentro de cuya familia se encuadra este derecho que justifica una tutela diversificada, específica, con soluciones particulares, preferente, prioritaria y privilegiada y que es la que solicitó con sustento en el artículo 43 de la Constitución Nacional.

Justificó luego su pedimento en los antecedentes que destacó, esto es, la Declaración de Patrimonio Natural y Cultural de la Humanidad a la zona en cuestión, explayándose en los considerandos del Comité de Patrimonio Mundial de la UNESCO, expresando que la Quebrada de Humahuaca comprende un valle andino de 155 kilómetros en el noroeste argentino, que comienza en el pueblo de Volcán y termina en Tres Cruces. Que dicho comité compuesto por 21 miembros en forma unánime, calificó al paisaje como un “sistema patrimonial de características especiales”. Tilcara –afirmó- fue fundada en el año 1586 y llamada así por la tribu indígena que habitaba la región, es la capital arqueológica de la Provincia de Jujuy, y la más renombrada del corredor natural. Agregó que por Ordenanza N° 45/05 se reconoció al Municipio de San Francisco de Tilcara como “Indígena”, en los términos del Convenio 169 de la Organización Nacional del Trabajo “Sobre Pueblos Indígenas y Tribales en Países Independientes” (1989), adoptado por Argentina mediante Ley N° 24.071, ratificada en julio de 2.000.

Adujo luego la parte actora que la empresa Uranio del Sur S.A. efectuó pedidos de cateo y exploración con los que se formaron los respectivos expedientes (N° 721 Letra U Año 2.007 y N° 1017 Letra U Año 2.008); que en uno de ellos la superficie solicitada es de cinco mil hectáreas (5.000 has) y en el otro caso, de nueve mil noventa y nueve hectáreas (9.099 has), con ubicación ambos en el Departamento de Tilcara, exactamente, se señala en el croquis agregado a las actuaciones, que en la zona de cateo solicitada se encuentra ubicada una comunidad aborígen llamada Volcán de Yacoraite, y en el mismo expediente administrativo consta que existe además un área de reserva de seguridad militar. En la otra causa, se brinda información también por medio del croquis, sobre que en la zona de cateo se halla la comunidad aborígen Yacoraite y otra de nombre Angosto de Yacoraite. Agregó que el Municipio de Tilcara promulgó la Ordenanza N° 13/08, la cual luego de extensos argumentos, dispone, entre otras cosas, la prohibición en la jurisdicción del municipio de radicación de explotaciones mineras metalíferas a cielo abierto y/o explotaciones mineras que utilicen sustancias químicas como cianuro, mercurio, ácido sulfúrico, y otras sustancias tóxicas similares en procesos de cateo, prospección, exploración, explotación y/o industrialización de minerales metalíferas, especialmente las referidas al Uranio.

Narró luego que el 10 de julio de 2.008 se labró un acta (“en el marco de una marcha multitudinaria”) en la que se dejó constancia (fojas 36 de la causa principal) de una reunión llevada a cabo con el Intendente de Tilcara, los integrantes del Concejo Deliberante de esa comuna, el Secretario de Cultura y Turismo de la Provincia, el Director de Minería, la señora Jueza Administrativa de Minas y el Director Provincial de Políticas Ambientales y Recursos Naturales de la Provincia, por la cual se expresa que “a pedido de las comunidades de diferentes regiones de la Provincia y como consecuencia de dos expedientes iniciados en el Juzgado Administrativo de Minas para obtener permisos de exploración de minerales de 1º y 2º categoría en la Quebrada de Humahuaca, luego de un intercambio de ideas y en atención a los antecedentes del caso, a las normas municipales citadas antes, se acordó suspender el trámite de los expedientes administrativos, firmando el acta todos los presentes, salvo la señora jueza de Minas que de su puño y letra agregó textualmente que “Ante la solicitud de suspensión de trámites formulada precedentemente por los funcionarios provinciales y municipales se recibe el documento haciéndose saber que se dictarán las medidas correspondientes en los plazos legales pertinentes, Tilcara, 10 de Julio de 2.008” (sic).

Refirió una declaración periodística del 15 de Julio de 2.008 en la cual el Secretario de Medio Ambiente y Recursos Naturales de la Provincia de Jujuy expresó que “el Gobierno, en el marco de su política de gestión ambiental basada en el concepto de desarrollo sostenido, no autorizará explotaciones mineras que afecten la figura de Patrimonio...” “...desestimamos –agregó el funcionario- la idea de llevar adelante un crecimiento económico a cualquier precio, porque somos férreos defensores de los valores patrimoniales, históricos y culturales de Jujuy”. Dijo la actora también que dicho funcionario recordó como antecedente que la UNESCO suscribió con el Consejo Internacional de Minería y Metales un acuerdo para lo no exploración de la minería en sitios de Patrimonio Mundial. Adjuntó la publicación que refirió y agregó que hasta la fecha de la demanda (1º de agosto de 2.008) no se había emitido resolución administrativa ni dispuesto la suspensión de los pedidos de exploración. Explicó luego las razones de la procedencia formal de la vía de amparo escogida para la protección de los derechos que invocó, y justificó la inexistencia de otro medio más idóneo como la inexigibilidad e imposibilidad de agotar la vía administrativa.

Adujo también una amenaza cierta, actual e inminente de daño ambiental. Al respecto fundó su posición en una editorial de un diario nacional, de la cual reprodujo palabras del Dr. Luis Castelli, presidente a esa época de la Fundación Naturaleza Para el Futuro (FUNAFU), en el sentido que la posible explotación de una mina de Uranio en la Quebrada de Humahuaca ha despertado la preocupación en una de las zonas más frágiles desde el punto de vista cultural y natural; agregó que varias comunidades de Juella, Yacoraite y Huacalera al igual que el Consejo Deliberante de Tilcara se pronunciaron contra la práctica minera en la zona. Que la nota refiere el conflicto en el año 2.000 que despertó el proyecto de construir una línea de alta tensión que atravesaría la zona hasta llegar a la ciudad de La Quiaca, al fracturar así su belleza natural. Que la propuesta finalmente fue desechada por no

encontrarse debidamente justificada desde el punto de vista técnico y económico. Alegó que la conciencia de ese valor logró años después, en el 2.003, que la Quebrada de Humahuaca fuera declarada Patrimonio de la Humanidad por la Organización de las Naciones Unidas para la Educación, la Ciencia y la Cultura (UNESCO). Que se tuvo en cuenta que se trata de una zona con un “sistema patrimonial de características excepcionales”; expresó que es un “itinerario cultural de 10.000 años”; que por sus senderos caminaron aborígenes de distintas etnias que aún hoy conservan creencias religiosas, ritos, fiestas, arte, música y técnicas agrícolas y ganaderas que constituyen un patrimonio viviente.

Que la declaración importa una responsabilidad especial para las autoridades y sus habitantes, responsabilidad –afirmó– que implica el fortalecimiento de un desarrollo educativo y sustentable de la zona y la preservación de su cultura. Se extendió luego sobre consideraciones acerca de la descripción del lugar cuya defensa pide, y dijo que la Quebrada de Humahuaca es una zona protegida turística por excelencia para la provincia de Jujuy. Que en particular en la región de Yacoraite, nace el río del mismo nombre, que provee de agua a poblaciones ubicadas más abajo y es la única fuente utilizada por pobladores y pequeños productores agrícolas. Entiende que el costo ambiental del daño provocado por cualquier actividad debe ser evaluado en profundidad, teniendo en cuenta que aún cuando esté en condiciones de suministrar beneficios inmediatos puede afectar el aire puro, las aguas limpias, los paisajes deslumbrantes y los sitios de recreación de lugares cuyo valor reside precisamente en esas condiciones naturales. En ese valor, tan poco considerado en los pasivos ambientales, puede residir el potencial económico de una comunidad.

Aseveró que es imprescindible plantear de modo transparente y participativo el grado de impacto o deterioro que ciertas actividades podrían ocasionar en esa área y en su calidad de vida. Que sólo así se fortalecerá la riqueza natural y cultural de nuestro país, muchas veces ignorada, y evitará los profundos desencantos que han provocado proyectos similares en otros lugares del mundo sustentados por la falsa creencia del “mal necesario o inevitable” del progreso.

Se refirió luego a la actividad minera y sus características como a las formas de llevarla a cabo, los métodos de explotación y sus consecuencias, en especial explicó acerca de la llamada “explotación a cielo abierto”. Concluyendo en que los métodos que se utilizan tienen potencialmente capacidad para contaminar las aguas subterráneas; señaló que el carácter de utilidad pública que revisten las etapas de exploración y explotación de las minas, habilita al minero a usar el terreno superficial, afianzando debidamente los daños y perjuicios, y aún más, le otorga derecho a expropiarlo en la medida de sus necesidades y el propietario –alegó– no puede oponerse por tratarse justamente en el caso de la minería, de una declaración general de interés público, que no debe ser probada por el minero en cada caso.

En ese contexto, expresó que cobraban plena vigencia los nuevos conceptos introducidos por el derecho ambiental, al auxilio de la naturaleza, de los ecosistemas y de los hombres que viven en ellos. Alegó que en esta materia rige el principio precautorio y por ende, dado el carácter catastrófico e irreversible con que a menudo se manifiestan los daños, ante la sola sospecha de riesgo, la falta de evidencias

científicas sobre las consecuencias obliga a llamar a la cautela y no a la acción, hasta tanto cualquier sospecha desaparezca, o en su caso, se confirme.

Este cambio de óptica, adujo, implicó desplazar la responsabilidad que hasta entonces sólo se operaba con el daño producido, trasladándolo hasta el momento anterior al hecho potencialmente peligroso, para operar así sobre el riesgo. Y agregó textualmente “esta necesidad expulsa, a juristas y jueces, del firme terreno de los hechos, para conducirnos a las arenas de las probabilidades, único modo de adelantarse temporalmente al daño y hacer posible su prevención”. “En Argentina, las explotaciones de uranio, oro y otros minerales metalíferos, llevadas a cabo hasta el momento han dejado daños ambientales catastróficos. La explotación de uranio es letal para los habitantes y los trabajadores de las minas. El daño ambiental es irrecuperable” (sic). Que todas las mezclas de uranio (natural, enriquecido y empobrecido) tienen los mismos efectos químicos en el cuerpo. Se trata de un material muy tóxico que afecta los sistemas óseo, renal y otros órganos del cuerpo humano, y que por ser radiactivo, además es cancerígeno. Finalmente, expresó al respecto que el Informe Nacional de la Cancillería Argentina sobre Ambiente, Desarrollo de las Naciones Unidas, reunido en Río de Janeiro en Julio de 1.991, expresa que “a los riesgos que se producen en la minería de uranio, se suman los de la operación y básicamente los vinculados a la disposición final de los residuos del proceso” (sic).

Desde el punto de vista jurídico, en la demanda se invocó, expresado sintéticamente, especialmente el segundo párrafo del artículo 41 de la Constitución Nacional. Además el principio precautorio adoptado por la ley de protección al medio ambiente que producirá, expuso, una modificación al régimen de la carga de la prueba, pues quien deberá acreditar la inocuidad de la actividad será el titular de la actividad y no el afectado, transformándose así el principio del derecho civil sobre que quien alega un daño deberá probarlo. Agregó que este principio además introdujo una renovada visión del clásico poder de policía, permitiendo apreciar la legalidad de actos administrativos prohibitivos o limitativos de derechos constitucionales, los que se justificarán a partir de la denominada incertidumbre sobre la falta de pruebas acerca de la inocuidad de determinada actividad. Expresó que tal fue el sentido de la Suprema Corte de Justicia de la Provincia de Buenos Aires, en el caso “Ancore S.A. y otros contra Municipalidad de Daireaux (Tomo IV, 2.002, J.A. pág. 392 a 397), en el que se estableció que frente a la ausencia de reglamentación específica referente a la actividad de los denominados “feed lot”, a raíz de los perjuicios que acarrea ese tipo de explotación de la actividad ganadera (por ejemplo olores muy desagradables), ello no facultaba a soslayar las consecuencias del impacto ambiental que producía. Que en suma, agregó, la responsabilidad en esta materia, tanto las reglas de la causalidad, el juego de las presunciones, la carga de la prueba, la atribución y distribución de responsabilidades y los alcances de los recursos deberán ser revisadas y reordenarse dentro de una nueva visión no sólo procesal sino a la vez del rol del Derecho y de la Justicia. Más adelante invocó como normativa aplicable el artículo 41 de la Constitución Nacional, La Ley Nº 25.675 de política Ambiental Nacional- Presupuestos Mínimos para la Gestión Sustentable, 2.002; Código de Minería T.O. por Decreto 456/97; Ley Nacional

Nº 24.585, modificada por la primera; Ley Provincial Nº 5.063 de Medio Ambiente (1.998); Ley Nº 5.206 que designa "Paisaje Protegido la Quebrada de Humahuaca en toda su extensión" (2.001); Decreto Reglamentario Nº 5.980, de la Ley de Medio Ambiente Provincial, mencionada antes; Decreto 789 de 2.004 que reglamente la ley de paisaje protegido; Ordenanza Nº 18/08 del Honorable Consejo Deliberante de la Ciudad de Tilcara y decreto Nº 180 de la Municipalidad de San Francisco del Tilcara promulgatorio de la Ordenanza anterior.

Ofrecida la prueba documental que da cuenta la demanda agregada a la causa principal (fojas 67 y vuelta), dejó planteado luego el caso federal.

El Estado Provincial en la audiencia respectiva agregó sendos escritos en los cuales respondió el pedido de cautelar efectuado por la actora y la contestación de la demanda. Alegó en su defensa respecto a la medida innovativa que se trataba de una cuestión que se había tornado abstracta en razón -adujo- de haberse acordado paralizar el procedimiento administrativo con anterioridad a la interposición de la demanda principal. Expresó que la presentación judicial fue notificada al Estado Provincial el 7 de Agosto del año 2.008 y que "en virtud de su competencia y facultades actuó en idéntico sentido al requerido por los actores" (sic), de modo que a juicio de la demandada, no existía trámite que hubiera que paralizar. Respecto al informe sobre los pedidos de exploración y cateo "en la zona declarada patrimonio natural y cultural" (sic), informó que se acompañaba adjunto a la presentación, por lo que también consideró innecesario un pronunciamiento expreso al respecto. Negó luego que se cumplan en el caso con los requisitos para la procedencia de una medida cautelar innovativa como la peticionada. Así expresó, que se trata de remedios procesales de carácter excepcional, que no es otra cosa, agregó, que el correlato de alterar mediante ella el estado de hecho o de derecho existente al tiempo de su dictado confirmando un anticipo de jurisdicción favorable respecto del fallo final, lo que justifica una mayor prudencia en la apreciación de los recaudos que hacen a su admisión. Al respecto consideró insuficiente una "mera declaración" (sic) para ordenar una medida innovativa; respecto a la verosimilitud del derecho afirmó que de la demanda resultaba una petición cautelar de protección "genérica, vaga y sumamente ambigua del derecho ambiental" (sic), sin precisión de la afectación que provocaría la exploración y cateo. Descartó además que existiese daño y peligro en la demora, brindando las razones que entendió adecuadas y adujo que la parte actora no ofreció ni otorgó la contracautela necesaria para responder a eventuales daños que la medida cautelar, en caso de prosperar, pudiera ocasionar. Finalmente, ofreció como prueba los expedientes administrativos que acompañó en fotocopia certificada y listado de los pedidos en trámite; pidió el rechazo de la cautelar impetrada y planteó además el caso federal. En la contestación de demanda (fojas 90/106), alegó el Estado Provincial ante todo la incompetencia del Tribunal Contencioso Administrativo para entender en el asunto, invocando la de la Cámara de Apelaciones en lo Civil y Comercial para recurrir las decisiones del Juzgado de Minas de la Provincia. Luego de negar los hechos alegados por la actora, dijo que la litis se encontraba incorrectamente integrada pues se hacía necesario convocar a la empresa Uranio del Sur S.A. ya que esa "insuficiencia pasiva" (sic) tornaría estéril un pronunciamiento judicial en el sentido pretendido. Alegó también falta de legitimación pasiva en razón justamente de la errónea y

defectuosa integración del litigio; entendió improcedente la vía del amparo por la extemporaneidad a raíz de la falta de cumplimiento del trámite administrativo respectivo y previo para acceder a la instancia judicial; interpretó “excesivo” (sic) el objeto de la acción en tanto la vía del amparo resulta improcedente cuando se pretende la revocación de todas las autorizaciones otorgadas a mineros para la exploración, cateo y explotación en la zona de la Quebrada de Humahuaca. Razonó que no puede declararse la nulidad de un acto administrativo dado su presunción de legitimidad y ejecutoriedad; alegó la inexistencia de vulneración a algún derecho constitucional porque el Estado Provincial respeta y exige el cumplimiento de los recaudos legales previstos en materia ambiental minera y además –agregó- los actores tienen oportunidad de volcar las inquietudes o impugnaciones en el marco del procedimiento administrativo. Sostiene que lejos de ser arbitraria o ilegítima las decisiones de la administración “pone de resalto que la situación minera imperante en la actualidad se ajusta a la ley positiva vigente” (sic). Afirma que no existe norma jurídica que prohíba la actividad minera, que por el contrario se trata de un acto de utilidad pública. Que la normativa que se refiere a la Quebrada de Humahuaca, respecto de la prohibición de extracción de minerales no es absoluta, sino para aquellos casos en los no se haya autorizado tal actividad. Respecto de las Ordenanzas invocadas alega que fueron dictadas con posterioridad al otorgamiento de los pedidos cuestionados y que además los municipios no tienen competencia para decidir en materia minera de acuerdo al régimen constitucional y legal vigentes.

Reiteró idénticos argumentos sobre la improcedencia por la inexistencia de daño inminente y grave, de urgencia en la demora, la improcedencia del amparo como vía apta, ofreció idéntica prueba que en la contestación de la cautelar, impugnó documental agregada por la actora, y ofreció otra causa, caratulada: “Juzgado Administrativo de Minas s/ Área Protegida Quebrada de Humahuaca Patrimonio Natural y Cultural de la Humanidad” (agregada también en copia certificada). Formuló reserva del caso federal.

El 13 de abril del 2.009 el Tribunal Contencioso Administrativo dictó sentencia para rechazar la acción de amparo, imponiendo las costas por el orden causado.

En lo medular, ponderó el Tribunal de grado que si bien comparte que al decidir cuestiones referidas a daños ambientales nunca será posible aferrarse a “estereotipos o cartabones procesales” (sic) que coarten el derecho de las partes, resaltó que los nuevos daños requieren también nuevas respuestas legales y brindar así una adecuada respuesta desde la perspectiva jurídica (citó a A. R. Sobrino en nota Lexis Nexis J.A.- Julio 2002). Entendió que ni de la prueba instrumental ofrecida por la actora, ni de la agregada por la demandada, surgía la mera posibilidad de daño.

Agregó que si bien es cierto que “respecto de los daños causados al medio ambiente resulta deber de todos coincidir en que esos daños se prevengan, ya que, una vez producidos, resultan en la práctica de una casi imposible reparación (cfr.: J.A. 11-1971-472), lo que en modo alguno releva al amparista de la acreditación de tales extremos” (sic). Que también es claro “que resulta indiscutible que el Juez en

su rol actual no es el mismo que el que pudo tener décadas atrás, y que ni el proceso ni los procedimientos son los mismos porque la alta complejidad de la técnica nos ha sobrepasado y la Justicia y el Juez tercián de modo distinto en el seno de la sociedad, sin perjuicio de lo cual, no surge de las probanzas introducidas al debate, ni siquiera la mera posibilidad de la efectivización de los daños que se dicen ocurrirán” (sic).

Asimismo expresó que compartía que “el concepto de responsabilidad y culpa en la generación de estos especialísimos daños -que de ocurrir no solo comprometen a la generación actual sino y especialmente a las generaciones futuras-, y respecto de su acreditación han ocurrido grandes cambios, empezando a dejarse de lado los conceptos tradicionales, en el sentido de que únicamente debía probar la parte actora, y que incluso una parte de la doctrina desarrolló la teoría de la ‘presunción de culpa’, y la ‘teoría de las cargas probatorias dinámicas’, pero en la dinámica del onus probandi ello no exime al peticionante de ofrecer las pruebas que se encuentren a su alcance, lo que no se verifica en el sublite”. Luego razonó que “también cambios similares vienen dándose en el concepto de la relación de causalidad por ejemplo, en cuanto a daños ambientales no se exige tanta certeza, sino se apunta a la probabilidad, es decir que ante la dificultad de poder aportar la certeza absoluta se está aceptando que -por lo menos- se establezcan probabilidades (cfr.: Vázquez Moreno, Lucía: ‘Responsabilidad Civil por daño ambiental’; Goldemberg, Isidoro y Cafferata Nores, Néstor: ‘Daño Ambiental, Problemática de su determinación causal’, cit O. Sobrino, op. cit.)” (sic).

Y que tampoco escapaba a su reflexión “que la Corte Suprema de Justicia de la Nación, ha dicho que ‘La tutela del ambiente importa el cumplimiento de los deberes que cada uno de los ciudadanos tienen respecto del cuidado de los ríos, de la diversidad de la flora y la fauna, de los suelos colindantes, de la atmósfera. Estos deberes son el correlato que esos mismos ciudadanos tienen a disfrutar de un ambiente sano, para sí y para las generaciones futuras, porque el daño que un individuo causa al bien colectivo se lo está causando a sí mismo. La mejora o degradación del ambiente beneficia o perjudica a toda la población, porque es un bien que pertenece a la esfera social y transindividual, y de allí deriva la particular energía con que los jueces deben actuar para hacer efectivos estos mandatos constitucionales’. (cfr.: ‘Mendoza Beatriz S. y otro c/ Estado Nacional y otro’ del 20 de junio de 2006- Cons. 20, Cons. 18)” (sic). “Que en particular el bien jurídico a proteger está por encima de normas adjetivas determinadas, y la finalidad de la justicia no puede verse mediatizada sino atender a la más amplia protección de los derechos cobijados por la Constitución de la Nación y de la Provincia” (sic), y entendió “que en autos no se ha acreditado ni siquiera en forma nimia la posibilidad de acaecimiento de daños ambientales por la actividad minera que se desarrolla en la Provincia, sin perjuicio de que estos fundamentos no puedan ser utilizados para negar que puedan efectivamente darse en la realidad daños ambientales de los enunciados, en un proceso donde tales cuestiones sean introducidas regularmente al debate y se acredite su existencia” (sic).

Meritó que “sin perjuicio de lo expuesto hasta aquí, de la sola lectura de los agravios expresados por la amparista y de la prueba ofrecida para respaldar sus dichos

consistente en expedientes administrativos, copia de una nota presentada al Juzgado de Minas, copias de ordenanzas y decretos y tres artículos periodísticos, surge de su análisis claramente que no se acredita la posibilidad del daño que se invoca, en tanto no se prueba, ni al menos se indica con cierta precisión en que consiste el 'daño ambiental', omitiendo particularizar en cada uno de los casos el nexo causal entre el sujeto (actividad minera específica), los medios utilizados y la consecuencia que considera dañosa, (lo que en mi criterio solo es posible luego de la realización de peritajes, dictámenes, etc); labor profesional y de parte que no puede ser reemplazada en esta instancia, en virtud del principio de contradicción, bilateralidad y especialmente de defensa en juicio y debido proceso legal, y menos aún cuando -como ocurre en autos- la actividad de la autoridad administrativa de control resulta fundado, y no ha merecido una crítica puntual, detallada y concreta de parte de la actora..." (sic).

En contra del pronunciamiento y atribuyéndole arbitrariedad, la Dra. Alicia Chalabe en representación de de Remo Leaña, Victorina Cruz, Dámaso Licantica, Víctor Hugo Valenzuela, Roger Lucein Moreau, Francisca Simona Jose, Ghislaine Fontaine y Eduardo Peloc, interpuso recurso de inconstitucionalidad.

El Estado Provincial contestó el traslado que le fue conferido. A los argumentos de ambos escritos remito en homenaje a la brevedad. El Ministerio Público Fiscal dictaminó en sentido adverso a la procedencia del recurso articulado, opinión, que adelanto desde ahora, no comparto.

Considero que la sentencia pronunciada por el Tribunal Contencioso Administrativo no constituye derivación razonada del derecho vigente y aplicable ni se ajusta a las constancias de la causa, sino que, por el contrario, adolece del vicio de arbitrariedad que se le atribuye por ser incongruente y autocontradictoria.

Es por ese motivo que entiendo que el recurso interpuesto por la parte actora, a mi modo de ver, no es una mera disconformidad con el fallo puesto en cuestión -y por eso no estoy de acuerdo con la opinión del Ministerio Público Fiscal-, sino que de lo que se trata verdaderamente es analizar de que modo el fallo del Tribunal de grado tiene en cuenta, o en todo caso, si valoriza correctamente el texto y el espíritu de normas de la Constitución Nacional (artículos 41 y 43) y artículo 22 de la Constitución Provincial.

Como tuve oportunidad de expresar in re "Asociación Civil CO.DE.S.E.D.H. c/ Ledesma S.A.A.I." (L.A N° 49, F° 4909/4913, N° 970), en la cuestión de los daños ambientales no es posible aferrarse, como también sucede en el caso que nos ocupa, a moldes ortopédicos de ninguna naturaleza sino que es menester resaltar que los nuevos daños requieren nuevas respuestas legales y de esa forma brindar una adecuada respuesta desde la perspectiva jurídica (cit. Por O. A. R. Sobrino en nota Lexis Nexis J.A.- Julio 2002).

En efecto, expuse que "los daños causados en el medio ambiente es el gran tema del siglo veintiuno y es deber de todos coincidir en que esos daños se prevengan, ya

que, una vez producidos, resultan en la práctica de una casi imposible reparación. Nuestra Suprema Corte de Justicia así lo ha expresado en el caso 'Podestá, Santiago y otros c/ Pcia. de Buenos Aires, al decir que 'ninguno puede tener un derecho adquirido de comprometer la salud pública y esparcir en la vecindad muerte y duelo con el uso que se haga de su propiedad y, específicamente con el ejercicio de una profesión o de una industria' (J.A. 11-1971-472)".

"Está claro para mí y es indiscutible que el Juez actual -y su rol- no es el mismo que el que pudo tener décadas atrás. El proceso ni los procedimientos son los mismos porque la alta complejidad de la técnica nos ha sobrepasado y la Justicia y el Juez tercián de modo distinto en el seno de la sociedad".

"Así como ha ido evolucionando el papel del Juez y de la Justicia, el concepto de daño también se ha tornado más amplio, hasta abarcar por ejemplo aquellos que se llaman 'daños generacionales' es decir aquellos que por su magnitud no repercuten solo en la generación actual sino que sus efectos van a impactar en las generaciones futuras".

Y agregué en aquella ocasión que "esto es lo que las naciones han querido prevenir mediante acuerdos internacionales, como por ejemplo el de Kioto, a cuya ratificación se han negado y niegan aún ciertas potencias que se aferran a un concepto escandalosamente economicista y empresarial".

"También en el concepto de responsabilidad y culpa en la generación de estos daños y de la prueba han ocurrido grandes cambios, empezando a dejarse de lado los conceptos tradicionales, en el sentido de que únicamente debía probar la parte actora. Incluso merced a un efecto péndulo, una parte de la doctrina desarrolló la teoría de la 'presunción de culpa', especialmente en el caso de las responsabilidades profesionales, donde se producía una inversión de la carga de la prueba de la culpa' (cfr. Gozaini -ED Universidad de Belgrano -1999)".

"Cambios similares se vienen dando en el concepto de la relación de causalidad por ejemplo, en cuanto a daños ambientales no se exige tanta certeza, sino se apunta a la probabilidad, es decir que ante la dificultad de poder aportar la certeza absoluta se está aceptando que -por lo menos- se establezcan probabilidades (Vázquez Moreno, Lucía: "Responsabilidad Civil por daño ambiental"; Goldemberg, Isidoro y Cafferata Nores, Néstor: "Daño Ambiental, Problemática de su determinación causal" cit O. Sobrino, op. cit.)".

"Como dijimos también la evolución y los cambios han conmovido, redimensionado y revalorado el concepto de la prueba, empezando por dejarse de lado los antiguos conceptos sobre el onus probandi".

"Lo que vengo advirtiendo hasta aquí me es útil para llegar a la certeza de que el fallo recurrido adolece de fundamentos concretos para haberse resuelto la cuestión como se pretende hacer. La interpretación de la prueba rendida y sobre todo su meritación -a mi modo de ver- son demasiadas ligeras, despojadas de la necesaria exigencia que debió primar...". "... Creo que en el caso de autos -agrego ahora que

también lo sostengo para el supuesto en tratamiento-, apenas se ha orillado la cuestión, sin mayor compromiso ni afán por la verdad objetiva”.

Sostuve también que “el daño ambiental en el caso que nos ocupa es sensible a las narices de cualquier persona que se desplace por la región y de allí que es menester recomendar a las autoridades provinciales y municipales que no abduquen del derecho y el deber que emana de la manda constitucional de proveer al bienestar general y afianzar la justicia”.

“La Corte Suprema de Justicia de la Nación, en el caso ‘Mendoza Beatriz S. y otro c/ Estado Nacional y otro’ del 20 de junio de 2006- Cons. 20, ha dicho que ‘La tutela del ambiente importa el cumplimiento de los deberes que cada uno de los ciudadanos tiene respecto del cuidado de los ríos, de la diversidad de la flora y la fauna, de los suelos colindantes, de la atmósfera. Estos deberes son el correlato que esos mismos ciudadanos tienen a disfrutar de un ambiente sano, para sí y para las generaciones futuras, porque el daño que un individuo causa al bien colectivo se lo está causando a sí mismo. La mejora o degradación del ambiente beneficia o perjudica a toda la población, porque es un bien que pertenece a la esfera social y transindividual, y de allí deriva la particular energía con que los jueces deben actuar para hacer efectivos estos mandatos constitucionales (Cons. 18)’...”.

“El bien jurídico a proteger está por encima de normas adjetivas determinadas y la finalidad de la justicia no puede verse mediatizada sino atender a la más amplia protección de los derechos cobijados por la Constitución de la Nación y de la Provincia, normas por cierto superiores a los meros ordenamientos procesales...” (L.A N° 49, F° 4909/4913, N° 970, causa Asociación Civil CO.DE.S.E.D.H. c/ Ledesma S.A.A.I.).

¿Como armonizar, entonces, la necesidad de los beneficios del progreso con el cuidado del medio ambiente?

Sin duda constituye un interrogante muy común entre quienes responsablemente orientan su preocupación en una verdadera y conciente preservación del medio ambiente a través de políticas públicas y privadas que razonablemente comprendan e impliquen un desarrollo sustentable basado, como es preciso, en el cuidado especial de no caer en la contaminación del medio ambiente si no en su preservación, pues el desarrollo de los pueblos jamás podrá ser ni sustentable ni aportará ciertamente beneficios, prescindiendo de sus cuidados y cometiendo abusos irreparables.

Esto es, no podrá haber desarrollo ni crecimiento sostenible si dejamos que el medio ambiente se degrade aún cuando sea paulatinamente –como ya no sucede, sino todo lo contrario-, puesto que el paso del tiempo habrá producido mayores pérdidas que las que se trata de evitar con la explotación de actividades –cualquiera sea, no sólo la minería- que no podrán perdurar, tampoco, justamente porque no existirá medio ambiente que soporte ninguna actividad susceptible de lograr beneficios de algún tipo.

El supuesto dogma aplicado al tema en debate y que instituye que no puede estarse en contra del crecimiento generado por la tecnología, tiene sin duda su límite o contrapartida, justamente en el propio cuidado del medio ambiente. Porque si las condiciones de salubridad desaparecen, por desatención e incumplimiento a las leyes naturales y legales sobre la materia, no habrá pues actividad útil que realizar, y siendo así, sucederá a muy corto plazo, desgraciadamente.

No puede anteponerse criterios normativos formales al derecho continental de medio ambiente sano e incontaminable.

De modo que en estos casos el juez es parte, el juez es interesado y por ello se exige un "juez activo protagonista" (Conforme La Ley 2.002, "Derecho Ambiental profundizado, páginas 10, 4-5, citado en Revista de Derecho de Daños, Daño Ambiental", Rubinzal Culzoni Editores 2.008-3, págs. 87/89).

El juez interviniente podrá (mejor dicho deberá) disponer todas las medidas necesarias, para ordenar, conducir o probar los hechos dañosos en el proceso, a fin de proteger efectivamente el interés general (Ley 25.675, artículo 32). En materia ambiental es rol irrenunciable del juez una participación activa con miras a la protección del ambiente (Capelletti, Mauro, La Protección de los intereses colectivos y de grupos, en Conferencia pronunciada en la Asamblea General de de la Sociedad de Legislación Comparada, publica en Revista de la Facultad de Derecho. México, N° 106 enero-junio de 1971; idem cita anterior).

Resulta un absurdo contrasentido permitir nuevas explotaciones como las aludidas en autos, en un territorio declarado patrimonio cultural de la humanidad, acto o declaración que, como se sabe, es revocable. Revocación que causaría seguramente daños a la infraestructura turística ya realizada, además de un papelón internacional.

Resulta por ello también muy ilustrativo el informe que obra agregado en las copias certificadas del Expte. Administrativo N° 1045, Letra J, año 2.008 (Juzgado Administrativo de Minas), caratulado: "Asunto s/ Área Protegida Quebrada de Humahuaca Patrimonio Natural y Cultural de la Humanidad", agregado a la causa principal, pues fue acompañado por el propio Estado Provincial, efectuado por la Unidad de Gestión de la Quebrada de Humahuaca, a cargo del Arquitecto Néstor José, cuando expresa a fojas 16/17 que "...No obstante lo dicho, (se refiere a que existen especialistas en la materia) en lo que sí incumbe a esta Unidad de Gestión, es importante destacar la opinión de la UNESCO, y, en tal sentido, cabe dejar sentado que dicha Organización es muy clara en su posición respecto a la minería en los Sitios de Patrimonio Mundial. Son varios los ejemplos donde a causa de las explotaciones mineras los sitios han sido colocados en la lista de Patrimonios Mundial en Peligro, como el caso del Parque Yellowstone (Estados Unidos de América), que ha sido retirado de esta Lista por el cese de esta actividad. Pero no deja de preocupar sitios como el Parque Nacional Kakadu (Australia), Parque Nacional Lorentz (Indonesia), el Parque Nacional Huascarán (Perú), el Parque Nacional de Doñana (España) y el Parque del humedal de Santa Lucía (Sudáfrica),

que de continuarse con las actividades mineras pueden perder la Declaración..."(el resaltado me pertenece) (sic).

Desde la perspectiva descripta no puede desconocerse, entonces, como lo admite el propio Tribunal de grado, que teniendo en cuenta los intereses en juego, no es posible prescindir de la preservación del derecho a un ambiente sano y no contaminado, Derecho Humano Fundamental.

Considero por ello que es inadmisibles el rechazo de la acción ejercida por no haberse arrojado prueba –según el criterio del tribunal sentenciante- cuando de acuerdo a la doctrina de las cargas probatorias dinámicas como a la posición sostenida unánimemente por doctrina y jurisprudencia, en caso de probables, posibles o bien que pueda presumirse ya provocado un daño ambiental por contaminación o cualquier otro motivo, deberá acreditar su inexistencia no sólo quien esté en mejores condiciones de hacerlo si no, y contrariamente a lo afirmado por el a-quo, quien precisamente sostiene tan ciega como concienzudamente que tal contaminación no existe y por ende, que no hubo ni acaeció daño ambiental alguno.

No hallo mejor defensa que aquella dirigida a demostrar que la razón asiste, con la prueba contundente y clara de tal afirmación respaldada así, indiscutiblemente, sobre la inexistencia de incumplimiento a las normas ambientales.

Resulta inadmisibles, entonces, que el Estado Provincial en su defensa como garante, ante todo y por sobre cualquier otro interés, de los derechos de los ciudadanos, no haya sido quien acompañe el informe técnico respectivo donde conste que –insisto, como categóricamente lo dice- en las zonas cuyo cateo y/o explotación fueron efectuados los pedidos de autorización, no se ha producido ni se producirá contaminación o algún otro medio idóneo que pudiera provocar daño al ambiente. Es decir, que era de cargo de la parte demandada la prueba positiva del resguardo del medio ambiente en territorio que, como también lo dije, tan luego fue declarado Patrimonio Natural y Cultural de la Humanidad.

Entiendo que, contrariamente a lo resuelto, no habiéndose arrojado dicha prueba ni ofrecido tampoco probar que la denuncia efectuada por los amparistas carece de sustento, es que cabe presumir, hasta tanto se demuestre lo contrario, que por lo menos existe la posibilidad o el peligro cierto de que las tareas que se realicen en la zona produzcan contaminación y conlleven daño ambiental. En consecuencia, es deber de los jueces como fue solicitado por la parte actora, proveer de inmediato al resguardo, y hacer efectiva la tutela judicial o protección de los intereses colectivos, tratándose de un derecho humano fundamental tanto de quienes allí habitan como de todos los habitantes, a un medio ambiente sano y sin contaminación, efectuando lo que fuera menester para evitarla (Artículos 22 de la Constitución Provincial y 41 de la Nacional).

Al respecto, hace ya mucho tiempo atrás se expresó que el principio de precaución en materia ambiental plantea que la incertidumbre científica no debe ser excusa (el resaltado es nuestro) para la adopción de medidas que tiendan a evitar la

posibilidad cierta de la ocurrencia de un daño ambiental grave, aunque su costo sea elevado, ni para convalidar la acción u omisión humanas potencialmente dañosas. Mas que ilustrativa resulta la Carta Mundial de la Naturaleza aprobada por la Organización de las Naciones Unidas (ONU) en 1982, cuando expone respecto al impacto ambiental que: "las actividades que puedan perturbar la naturaleza serán precedidas de una evaluación de sus consecuencias y se realizarán con suficiente antelación estudios de los efectos que pueden tener los proyectos de desarrollo sobre la naturaleza en caso de llevarse a cabo; tales actividades se planificarán y realizarán con vistas a reducir al mínimo sus posibles efectos perjudiciales" (11.c); en sentido parecido se expresó la Declaración de Río de 1.992 enunciado en el principio N° 15. No menos importante es el axioma sentado también en la Carta de la Naturaleza de 1.982, en cuanto a que "las actividades que puedan entrañar grandes peligros para la naturaleza serán precedidas de un examen a fondo y quienes promuevan esas actividades deberán demostrar que los beneficios previstos son mayores que los daños que puedan causar a la naturaleza y esas actividades no se llevarán a cabo cuando no se conozcan cabalmente (el remarcado nos pertenece) sus posibles efectos perjudiciales" (11, b).

Estos principios a los que aludo, fueron finalmente normatizados y constituyen derecho vigente de acuerdo al contenido de las constituciones nacional y local, como al artículo 4° de la ley N° 25.675, General del Ambiente.

Sostengo además y por estos motivos que, contrariamente a lo que entendió el Tribunal de grado, con el hecho nuevo agregado al principal por Expte N° 197.603/01/08, caratulado: "Incidente de hecho nuevo en Expte. N° 197.603/08: Leaña, Julia Rebecca... y otros c/ Estado Provincial", expresamente se informó sobre la existencia de presuntos daños ambientales y se ofreció la prueba respectiva -el libramiento de los oficios a los juzgados federales con asiento en la Provincia de Jujuy- para que fueran giradas las actuaciones en las que supuestamente se llevaba a cabo la investigación, todo lo cual fue desatendido y olímpicamente ignorado, también, por el Tribunal sentenciante. De modo que no es verdad -tampoco- que la parte actora no ofreció prueba alguna para afirmar los hechos alegados en la demanda. Y las actuaciones que acabo de mencionar lo acreditan sobradamente.

Esto así, sin perjuicio, claro está, de lo expresado anteriormente respecto a la carga de la prueba o al onus probandi, pretendidamente invertido en el caso que tratamos, y que -reitero- más allá de las cargas probatorias dinámicas, la obligación está impuesta a quien pretende efectuar o realizar explotaciones o actividades con potencial capacidad dañina, e instrumentadas tan luego no sólo por normas internas sino además internacionales, de las cuales sólo se han mencionado algunas.

De las constancias de la causa y sus agregados, surge evidente e irrefutable que a la fecha de la interposición de la demanda, de su contestación, de la sentencia y, es de suponer, hasta la fecha -ya que con posterioridad no se presentó manifestación o informe alguno en contrario- ni existía ni se mandó producir prueba a través de estudio técnico alguno que demuestre fehaciente y preventivamente con el grado de certeza necesario, la ausencia de probabilidad de contaminación o bien, directamente, la inexistencia de daño cierto y actual a la época de la tramitación de

la autorización u otorgamiento de los permisos para las prácticas de cateos y/o exploraciones y explotaciones. En consecuencia, no se dio cumplimiento con los requisitos imprescindibles e ineludibles previos a cualquier actividad con aptitud para provocar toxicidad, contaminación, etcétera, y con ello, en su caso, daño ambiental, dejando de lado así lo dispuesto por el artículo 2º de la Ley N° 25.675, en especial incisos a), d), e) g) y k).

En definitiva, considero que no resulta ni imposible ni inconciliable aprovechar las oportunidades brindadas para el progreso por medio de actividades económicas productivas sustentables, con el cuidado y protección del medio ambiente.

Estoy convencido, que así como no es posible el ejercicio absoluto de los derechos, sí puede tentarse un régimen equilibrado de los intereses en juego.

Claramente lo expresan los textos constitucionales aludidos, artículos 22 de la provincia y 41 de la Nación. “La norma ha hecho una verdadera simbiosis entre salud, equilibrio y crecimiento”, dice Hutchinson. Y agrega “la Constitución tiene una fórmula abierta pero limitada, por la cual el empleo de las actividades productivas debe hacerse siempre en el marco de la razonabilidad que no coarte el futuro de las nuevas generaciones. Ello demuestra que se intentó construir un sistema equilibrado...”. “... Esa fórmula se traduce en una ecuación entre ambiente y actividades humanas que haga posible el desarrollo y el crecimiento de la persona sin destruir su entorno. Equilibrado quiere decir proporcionado, razonable...”. “... Del segundo párrafo de la cláusula constitucional se deduce que no sólo constituyen los recursos naturales el eje natural sobre el que gira el ambiente, sino que es un conjunto de naturaleza y cultura...”, para concluir en que “... La constitución ha puesto a cargo de las autoridades la necesidad de proveer a la preservación del patrimonio natural y cultural, recepcionando en alguna medida, la preocupación esbozada en la Convención para la Protección del Patrimonio Mundial, Cultural y Natural de la UNESCO...” (Confrontar Daño Ambiental, Tomo I, Jorge Mosset Iturraspe, Tomás Hutchinson y Eduardo Alberto Donna, Edición Rubinzal Culzoni, páginas 342/345).

Ahora bien, considero como consecuencia de todo lo expuesto que, respecto al pedido de la parte actora sobre prohibición judicial absoluta, es preciso tener presente que resulta genérica y por ello escapa a las facultades de este Poder Judicial, siendo en todo caso menester la intervención de los otros poderes del Estado para legislar conforme los principios expresados en la Constitución Nacional y Provincial, las leyes, doctrina y jurisprudencia citadas, y lo expuesto en este voto.

En consecuencia, entiendo como lo adelanté, que según los antecedentes que obran agregados a las actuaciones principales a estos autos, y que han sido minuciosamente detallados en el relato de los hechos, y apartándome de los fundamentos expuestos en el dictamen del Ministerio Público que, como queda dicho, en modo alguno comparto, concluyo en que debe acogerse el recurso de inconstitucionalidad interpuesto por la Dra. Alicia Chalabe en representación de Julia Rebeca Leño; Remo Leño; Victoriana Cruz de Mamani; Dámaso Licantica; Víctor

Hugo Valenzuela, Roger Lucein Moreau, y otros, para revocar la sentencia dictada por el Tribunal Contencioso Administrativo el 13 de abril del 2.009 y hacer lugar a la demanda de amparo promovida, y en su mérito, ordenar al Estado Provincial prohíba a la autoridad administrativa pertinente, es decir, Juzgado de Minas de la Provincia, otorgar los permisos de cateo y exploración que tramitan por los Expedientes denunciados por la parte actora y solicitados por la empresa Uranio del Sur S.A., a saber: N° 721 Letra U Año 2.007 y N° 1017 Letra U Año 2.008; debiendo abstenerse en consecuencia dicha empresa o cualquier otra de realizar cateos, exploraciones, explotaciones mineras a cielo abierto y/o que utilicen sustancias químicas tóxicas en los procesos de prospección, y/o industrialización de minerales metalíferos, en especial el uranio, en la zona comprendida en los pedimentos respectivos. Las costas considero que deberá cargarlas la recurrida demandada que resulta vencida y diferirse la regulación de los honorarios profesionales para cuando se pueda aplicar el artículo 11 de la ley arancelaria local.

Así voto.

Los Dres. del Campo, Bernal, Jenefes y González dijeron: ...

Por lo expuesto, propiciamos se revoque la sentencia cuestionada y se remitan los autos al Tribunal de origen para que, previa citación de la empresa Uranio del Sur S.A., dicte nuevo pronunciamiento, con arreglo a derecho.

Atento a la forma en que se resuelve el presente y en tanto los fundamentos expuestos no son los esgrimidos por ninguna de las partes, estimamos justo que las costas sean impuestas por el orden causado y se difiera la regulación de los honorarios profesionales para cuando se determinen los que corresponden por la actuación en el principal.

Así votamos.

Por lo expuesto, el Superior Tribunal de Justicia de la Provincia de Jujuy, Resuelve:

1º) Revocar la sentencia dictada el 13 de abril de 2.009 y remitir los autos al Tribunal de origen para que, previa citación de la empresa Uranio del Sur S.A., dicte nuevo pronunciamiento, con arreglo a derecho.

2º) Imponer las costas por el orden causado y diferir la regulación de los honorarios profesionales.

3º) Registrar, agregar copia en autos y notificar por cédula.

Firmado: Dr. Héctor Eduardo Tizón; Dr. José Manuel del Campo; Dra. María Silvia Bernal; Dr. Sergio Marcelo Jenefes; Dr. Sergio Ricardo González.

Ante mí: Dra. Constanza María López Iriarte - Secretaria Relatora.



Chapter 4: Adjudicating Environmental Constitutionalism

[I]t has fallen frequently to the judiciary to protect environmental interests, due to sketchy input from the legislature, and laxity on the part of the administration.

—Chief Judge B.N. Kirpal, Supreme Court of India

Environmental constitutional jurisprudence is gaining salience around the globe. In India and neighboring countries and throughout Latin America, for instance, courts are increasingly vindicating rights in a wide variety of settings, from mining to water and air pollution. And new rights are continually being recognized.

This Chapter examines judicial engagement of constitutionally embedded environmental rights provisions. It first examines the myriad challenges presented by adjudicating claims rooted in environmental constitutionalism, including textual interpretation, costs, balancing, and judicial boundaries. It then bores into just how constitutional and other apex courts have received such claims. We conclude that

while some courts have avoided engaging environmental constitutionalism there is noticeable and steady progress toward recognition of environmental rights as independent, dependent, derivative, or dormant rights in courts throughout the world. Moreover, even where courts have not accepted that a constitutional environmental right has been contravened, the mere fact that such arguments are being made and considered augments the attention that constitutional environmental rights receive in public discourse. And this, in itself, can meaningfully contribute to the success of environmental claims in the future. The result is that, collectively, courts will continue to play a necessary role in the vindication of environmental constitutionalism worldwide.

A. Challenges in Adjudicating Environmental Rights

Claims seeking to vindicate individual rights to a quality environment engender unavoidable challenges. First, courts need to develop or interpret new concepts and vocabulary, determining the scope of "environment" and the measurement of "healthy" or "quality," for instance. Second, the usual hurdles of litigation are often exacerbated in constitutional environmental cases, including those relating to costs, the need for technical expertise, the quantum of evidence needed, and so on. Third, vindicating environmental rights typically presents fundamental questions of policy choices in that they often pit the human rights claims against each other, such as when an industry closure improves water quality at the expense of jobs, or when the cost of expensive equipment to alleviate air pollution is borne by consumers or employees.

1. Interpreting Constitutional Text

Constitutional provisions are often enacted with little if any guidance on threshold questions. They typically have little or no drafting history, and they tend to leave much unsaid in the text itself. With some exceptions, there is little evidence of the intent of the drafters of these provisions that would provide guidance to their interpreters. At bottom, environmental constitutionalism requires judges to deconstruct nouns, verbs, predicates, subjects and objects. Each of these choices can have wide-ranging consequences that can affect the health and dignity of individuals, the lives of communities, the health of ecosystems, and potentially national economies and political outcomes.

Noun: Environment. There is inherent lack of certainty about what the 'environment' entails and how a meaningful conception of the environment can be incorporated into the structure of constitutional adjudication. The Chilean Supreme Court has recognized the potential reach of the term:

[T]he environment ... is everything which naturally surrounds us and that permits the development of life, and it refers to the atmosphere as it does to the land and its waters, to the flora and fauna, all of which

comprise nature, with its ecological systems of balance between organisms and the environment in which they live.¹

Other courts have also construed ‘environment’ broadly, invoking it in disparate circumstances. It can refer to physical landscape, fauna, spaces of religious or cultural significance, and the built environment. In *Minors Oposa v. Factoran*, the Philippine Supreme Court recognized the difficulty of giving meaningful boundaries to the constitutional mandate of “a balanced and healthful ecology:”

The list of particular claims which can be subsumed under this rubric appears to be entirely open ended: prevention and control of emission of toxic fumes and smoke from factories and motor vehicles; of discharge of oil, chemical effluents, garbage and raw sewage into rivers, inland and coastal waters by vessels, oil rigs, factories, mines and whole communities; of dumping of organic and inorganic wastes on open land, streets and thoroughfares; failure to rehabilitate land after strip-mining or open-pit mining; kaingin or slash-and-burn farming; destruction of fisheries, coral reefs and other living sea resources through the use of dynamite or cyanide and other chemicals; contamination of ground water resources; loss of certain species of fauna and flora; and so on.

Harm to the environment is likewise broad. A degraded environment may affect people’s lives, dignity, health, housing, access to food and water, and livelihood and it may affect the ecosystem itself. In general, the cases do not readily distinguish between environmental and human harms. This doctrinal fluidity may be due in part to the underdevelopment of the law or it may be due to the interlinked nature of the harms themselves. Access to drinking water is a human right unrelated to environmental dimensions as long as there is sufficient supply; it devolves into an environmental right when it becomes scarce (perhaps due to desertification) or polluted (perhaps in violation of environmental laws).

With this broad conception of the environment in mind, it is easy to see why admitting, or rather denying, particular claims is challenging. With some exceptions—including subnational constitutions in Brazil, for example—constitutions seldom if ever delimit the scope of environmental protection or the types of actions that may be pursued in courts. Hence, courts are typically left to define for themselves the boundaries of their own authority, an exercise that tends to hinder judicial activation of environmental constitutionalism.

Adjective: Healthy, Balanced or Quality Environment. The adjectives that drafters around the globe have used to qualify the ‘environment’ tend to add a level of vagueness. What satisfies the constitutional requirement of a ‘quality,’ ‘safe,’ ‘healthy,’ ‘productive,’ or ‘balanced’ environment? How does a court decide when that standard has been achieved? Constitutional provisions that contain compound adjectives add to the confusion. The Philippine Constitution, for example, requires the State to “protect and advance the right of the people to a balanced and healthful

ecology.” Does healthful entail balanced or does it impose an independent requirement? The challenges mount when one considers that human activity has already inexorably altered virtually all aspects of the ‘environment.’ In the industrialized or industrializing world, how ‘clean’ must environment be to meet the constitutional standard? And should a court determine what to weigh to determine if an environment is ‘balanced’?

Beyond the problem of measurement is the question of attribution. If ‘healthy’ modifies the environment, then the right would extend to cases involving environmental degradation *per se*, regardless of its effect on humans. This would include cases requiring the clean-up of beaches of Chañaral, Chile, for instance, where copper tailing wastes had been deposited for 50 years, destroying marine life. In *Pedro Flores*, the Chilean Supreme Court observed:

[T]he daily accumulation of thousands of tons of contaminants by whose fast and silent chemical action the ecology, along the coast, is destroyed, producing the ecological destruction of all forms of marine life in hundreds of square kilometers . . . a devastation that blossoms over the whole coastal area of the National Park Pan de Azúcar, with which dies a piece of Chile.”

Where this is the standard, the case would center on whether the environment itself is healthy, not on whether the environmental degradation induced any harm to human beings.

But in most cases, the courts consider a ‘healthy environment’ as relating to the health of the local population, not of the environment. Sometimes the anthropocentric nature of the right is justified or even demanded by the constitutional text itself. For instance, it is clear in the Turkish constitution that the purpose of protecting the environment is to benefit people, not ecology: “Each individual has the right to live in a healthy and balanced environment. . . . The State must provide centralised health institutions and organise related services, so that people’s lives are protected, people can continue to live in a physical and mental health, saving human and material energy, increasing efficiency and developing cooperation.” Likewise, the Peruvian constitution creates the right “to peace, tranquility, enjoyment of leisure time and to rest, as well as to a balanced and appropriate environment for the development of his life.” Thus, in a Peruvian case against an American corporation operating a lead smelter, it was sufficient to show evidence that the health of the children in the local community was severely impacted, regardless of any attendant degradation to the environment itself.

More often, courts blend human and ecological impacts because the text itself is ambiguous. The Argentine constitution, for instance, provides: “All inhabitants are entitled to the right to a healthy and balanced environment fit for human development in order that productive activities shall meet present needs without endangering those of future generations; and shall have the duty to preserve it.” ‘Healthy’ may relate to human health but ‘balanced’ surely qualifies the environment, so in the landmark case requiring the clean-up of the Matanza-Riachuelo River Basin,

for example, the evidence and discussion of harm to the water itself and harm to the people who live near it were inextricable.

Object: Right. Rights are not interests that an individual holds, but ways to structure relationships—among people within a legal community and between people and the state. It is apt, then, to constitutionalize environmental rights to help structure those relationships insofar as the environment is concerned. Environmental rights, as we have seen, structure the relationships between present and future generations, by limiting what the former can do to the latter, as well as the contemporaneous relationship among people. Environmental rights also structure the relationship between neighbors, for instance, as they regulate how a property owner might use his land, or between upstream and downstream users of water. Courts, then, have an important role to play in mediating the relationships that are described and structured by constitutional environmental rights.

So how do courts give content to the concept of environmental rights without allowing them to swallow up every other right? One approach, which borrows from the discourse at the international level, is to limit the reach of environmental rights to already accepted human rights. Environmental constitutionalism has pushed the conventional limits of this approach in two directions. First, national courts are recognizing an ever-increasing number of constitutional human rights claims and many of these have been held to touch on environmental phenomena. The Constitutional Court of South Africa, for instance, has held that the right to housing, which may be more readily amenable to enforcement than environmental rights *per se*, may be violated by inattention to environmental problems. Even where constitutions do not specifically enumerate particular rights, courts have expanded the scope of interests that constitute violations of familiar human rights by recognizing, for instance, that environmental degradation can constitute a violation of privacy and family life or that esthetic and recreational environmental interests are essential to enjoying a dignified existence. As the Supreme Court of Pakistan has said: “The Constitution guarantees dignity of man and also right to life ... and if both are read together, question will arise whether a person can be said to have dignity of man if his right to life is below bare necessity like without proper food, clothing, shelter, education, health care, clean atmosphere and unpolluted environment.” Second, courts have expanded the range of putative beneficiaries by including not only property owners but also non-traditional rights holders, including neighbors, communities, and future generations. As this body of law expands, there are very few interests of any consequence that remain outside the framework of constitutional human rights. Still, the environmental interest would have to be seen as an incident of an already recognized human right.

A slightly less anthropocentric option is explicitly to recognize environmental rights as a human right, so that environmental harms do not have to fit neatly into the other human rights boxes. This view reflects an international environmental law approach and has been incorporated into constitutions throughout the world. This also ensures that environmental values are given at least as much weight as other constitutional values. This would reflect at the national constitutional level trends in

unifying environmental and human rights that are advancing at the international level.

An even less anthropocentric approach involves a class of rights somewhere between human rights and rights of nature that permit humans to commence constitutional environmental claims to protect nature or wildlife. A final approach would entirely reject anthropocentrism and recognize instead the rights of nature, as Ecuador and Bolivia have recently done and as may be spreading to other regions of the world. To vindicate these rights, it is not necessary to refer at all to human interests or rights; rather, the harm to be vindicated is the violation to nature itself.

If vindicating environmental rights does not require harm to humans, it is hard to square with the concept of a constitutional right. A plaintiff would be complaining about a bad state of affairs, like suing over the global financial crisis or the prevalence of cancer. If it does require harm to humans, then it starts to look more like a constitutional (or indeed any kind of common law) claim, but the difficulty of proof increases with each additional required showing. While it may not require significant litigation resources to prove that dumping toxic waste has occurred, it may be very difficult to prove that such dumping has increased or will increase the incidence of cancer in the local community, or that it caused a particular plaintiff's illness. The problem is magnified when litigation seeks to vindicate the rights of future generations; how can future generations be "made whole" to use the common legal remedial standard? Constitutional texts typically shed little light on these questions respecting beneficiaries.

These difficult questions of public policy may, in some instances, even require recalibrating the boundaries between the public and private spheres. While some governments are held responsible for the environmental degradation caused by their licensees, some corporations are required to take on public goods like environmental clean-up. Environmental litigation may often in fact invert the normal expectations relating to the roles of public and private parties. Whereas traditional constitutional rights litigation pits the private individual against the public authority, environmental litigation often pits members of the public against a private entity (thus invoking the principle of the horizontal application of constitutional rights and obligations). Moreover, in many of these cases, private individuals are asserting public rights, whereas the government is facilitating private gain. As a result, environmental litigation is increasingly forcing courts to adjust long-held views about the proper allocation of public and private power.

2. Identifying Breaches

Typically, a constitutional violation exists where a government actor has impaired a person's ability to exercise the full scope of her rights—where, for instance, a person is unable to speak freely or where she is treated unequally to those who are similarly situated. But identifying the nature of the violation in environmental rights is a quixotic task. First, some environmental degradation is inevitable, so the baseline is not maximal enjoyment of the right but something less than that. No defendant can be held liable for air that is not pure or for the use of some nonrenewable resources the way it can be held liable for even a small infringement of a traditional

constitutional right. Indeed, most environmental law (including the principles underlying the public trust doctrine and sustainable development) is premised on the principle that some nature is to be consumed by humans—just not too much or too selfishly. As a result, constitutional environmental claims, unlike other human rights, are necessarily limited by other important interests: whereas courts typically are not concerned about overprotecting speech or demanding too much equality, excessive environmental protection is often seen as derogating from economic development, the rights of property owners, or other significant social values.

Another challenge in implementing environmental constitutionalism is to identify the actual harm that has been done. Establishing causation can be problematic. Sometimes, this problem can be operationalized as a choice between human rights and environmental rights, although in the concrete context of litigation, even these classifications do not answer all questions. In all too many cases, divining the line between a problem and a cognizable injury—identifying when the proper use of river water becomes an abuse, or when the release of toxins becomes injurious to public health—requires courts to balance equities with little if any prescriptive guidance. This problem is magnified with the growing number of claims relating to climate change, of which there is abundant evidence, but the evidence tying it to specific harms suffered by specific humans within a specific nation is much more tenuous. Usually, something more is needed to turn a misfortune into a claim.

B. Four Types of Judicial Interpretation

Ascertaining the extent of judicial receptivity to environmental constitutionalism is challenging. Domestic constitutional and apex courts are arguably the best indicators of judicial tolerance to constitutionalism in any given country. Their decisions are more likely to engage the definitional, structural and policy concepts so central to constitutionalism. They are intended and expected to speak with authority, often with the last word that binds lower courts and administrative tribunals. And they are most likely available and subject to ready interpretation.

What these decisions reveal is that judicial receptivity to environmental rights cases can be divided into four categories. First, some courts have recognized causes of action to enforce express constitutional rights to a quality environment and of nature. We call these ‘independent’ environmental rights cases because they do not rely upon other constitutional provisions. The leading independent environmental rights cases come from Central Europe and Latin America where many courts have been enthusiastic enforcers of textually explicit environmental provisions. Second, some courts have recognized a right to a quality environment as an adjunct of constitutional provisions that direct the government to protect the environment as a matter of duty or policy. We call these ‘dependent’ environmental rights cases because they depend on the existence of environmental policy provisions that are typically not judicially enforceable. The Supreme Court of the Philippines has been a pioneer in deciding dependent environmental rights cases. Third, some courts recognize environmental rights as being implicitly incorporated into other substantive, enforceable constitutional rights, including a right to life, family, or

dignity. We call these 'derivative' environmental rights cases, because the cause of action derives from another constitutional right. High courts in India, Pakistan and Nepal have been at the forefront of recognizing dependent environmental rights. Last, constitutional and apex courts in the majority of countries to have adopted environmental rights have yet to engage it other than episodically. We call these 'dormant' environmental rights. With this framework in mind, we turn to the cases.

1. Independent Environmental Rights

Dozens of countries have constitutions that expressly recognize a right to a quality environment. Only a fraction of these provisions, however, have been tested before domestic constitutional or apex courts. The majority of cases involving constitutional environmental rights, including some of the earliest, come from courts in South America and Central Europe.

Courts in South America have also been willing to engage environmental constitutionalism. For example and as noted above, in 1988, the Supreme Court of Chile in *Pedro Flores v. Corporación del Cobre, Codelco, Division Salvador* upheld a constitutional environmental right "to live in an environment free from contamination," to stop the deposition of copper mill tailings onto Chilean beaches that were adversely affecting protected marine life.

And then in 1997 it issued what may be that country's most significant constitutional environmental rights decision. The Tierra del Fuego region of Chile contains some of the world's last remaining continuous stands of cold-climate virgin forests, known as "dwarf trees," in the world, stands that were spied upon and written about by Magellan and Darwin. The U.S.-based Trillium Corporation, however, saw the trees as cropland for the global paper market, and asked the Chilean government for permission to log 270,000 hectares of it for \$350 million in what was known as the "Rio Condor Project."

Chilean citizens brought a lawsuit, claiming that the Rio Condor Project violated their constitutional "right to live in an environment free from contamination." The Supreme Court of Chile agreed. In what is known as the *Trillium* decision, the Court enjoined the project, holding that the Chilean constitution requires "the maintenance of the original conditions of natural resources," and that governmental agencies are required to keep "human intervention to a minimum."

In the aftermath of *Trillium*, Chile instituted an environmental review procedure to hear constitutional claims.

In the *Trillium* decision, the Court also held that the constitutional right to a healthy environment is owed to all citizens, thus allowing the plaintiffs to pursue the matter as an *acción de amparo* even though none of them had personally suffered any injury. Likewise, in *Proterra v. Ferroaleaciones San Ramon S.A.*, the Supreme Court of Peru permitted citizens to proceed with such open standing to enforce entrenched environmental rights. Moreover, in keeping with the *Minors Oposa v. Factoran* decision, the Philippine Supreme Court in *Manila Bay* recognized broad standing to enforce environmental constitutional rights, allowing for citizen standing in matters

that are of “paramount interest to the public” or of “transcendental significance to the people.”

Constitutional and other apex courts in other countries in Latin America have been receptive to environmental constitutionalism. In *Carlos Roberto Garcia Chacon*, the Constitutional Court of Costa Rica upheld a constitutional “right to a healthy and ecologically balanced environment” as being fundamental, self-executing, and enforceable. The Court noted that “all citizens possess to live in an environment free from contamination. This is the basis of a just and productive society.” In another case, the Constitutional Court in Costa Rica invoked the same provision to stop a transnational banana company from clearcutting approximately 700 hectares near the Tortuguero National Park. The protected area includes nesting habitat for the endangered green macaw.

Courts in Argentina have found enforceable that country's constitutional guarantee that “[a]ll inhabitants enjoy the right to a healthful, balanced environment fit for human development, so that productive activities satisfy current needs without compromising those of future generations” In 1993, the Supreme Court of Argentina observed that “[t]he right to live in a healthy and balanced environment is a fundamental attribute of people. Any aggression to the environment ends up becoming a threat to life itself and to the psychological and physical integrity of the person.” In *Alberto Sagarduy*, the Supreme Court of Argentina upheld a citizen's rights to enforce constitutional environmental rights without first having to exhaust administrative remedies. And in *Sociedad de Fomento Barrio Félix v. Camet y Otros*, the court ever invoked the provision in upholding the right to enjoy an ocean view.

The Constitutional Court of Ecuador has embraced that country's constitutional guarantee of substantive environmental rights. For example, in *Fundación Natura v. Petro Ecuador*, the court upheld a civil verdict against Petro Ecuador on the basis that the production of leaded fuel violated Ecuador's constitutional guarantee to a “healthy” environment. In *Arco Iris v. Instituto Ecuatoriano de Minería*, using the same right to a healthy environment, the Court concluded that degradation of Podocarpus National Park “is a threat to the environmental human right of the inhabitants of the provinces of Loja and Zamora Chinchipe to have an area which ensures the natural and continuous provision of water, air humidity, oxygenation and recreation.” Nonetheless, the temptation of lucrative opportunities to exploit the country's abundant natural resources presents a persistent challenge to responsible stewardship of its globally significant environment.

In the immediate aftermath of the fall of communism, courts in some post-communist countries in Central and Eastern Europe also aimed to implement newly minted constitutional environmental rights provisions. For example, in 1989, Hungary amended its constitution to recognize “the individual's right to a healthy environment.” The Constitutional Court of Hungary seems to have been the first in Central and Eastern Europe to give force to this type of provision. In *Case 28/1994*, the Court held that the Hungarian legislature's efforts to sell for cultivation previously nationalized forested lands under the former communist regime would be

unconstitutional, finding that it violated the constitutional environmental rights residing in the Hungarian Constitution. The Court rejected the state's justification for the repeal, reasoning that "[t]he right to a healthy environment guarantees the physical conditions necessary to enforce the right to human life... extraordinary resolve is called for in establishing legislative guarantees for the right." Thus, it held that once the State created a baseline of environmental protection, it could not thereafter degrade it. The Court also held that violation of environmental rights ran afoul of the constitution's "right to life."

The Constitutional Court of Latvia has been particularly active in enforcing that country's constitutionally-enshrined environmental rights. Section 115 of the Constitution of Latvia provides: "The State shall protect the right of everyone to live in a benevolent environment by ... promoting the preservation and improvement of the environment." The court has struck several local land use decisions as violative of Article 115, especially in the context of activities that might cause or contribute to flooding. For example, in *Amolina v. Garkalne Apagasts Council*, the court held that a local land use development plan that would have permitted development of flood zones was unconstitutional under Article 115. The court held that by allowing development in flood zones the city council had fallen short of its duty to "promote the preservation and improvement of the environment." It also held that that the land use plan violated the affected individuals' "fundamental right to live in a benevolent environment," which, the court wrote, "shall be directly and immediately applied." Likewise, in *Balams v. Ādaži Parish Council*, the court struck a land use plan for largely the same reasons. And in *Gruba v. Jurmala City Council*, the court drew support from the Stockholm Declaration and the Aarhus Convention in striking another land use development plan as violative of an individual's right to live in an environment that does not endanger human health and well-being. These decisions were dispositive, meaning that the government decisionmakers were enjoined from implementing the challenged plans.

Nonetheless, the court has determined that the right to a "benevolent" environment is not absolute, but involves a balancing of costs and the public good. Evidence matters. Accordingly, in *Baldzēns v. Cabinet of Ministers*, the court rejected a community's challenge to the Ministry of Environmental Protection and Regional Development's issuance of a permit to operate a hazardous waste incinerator for failure to submit sufficient evidence that environmental harms outweighed ensuing public benefit.

Section 115's right to a benevolent environment can also be outweighed by other constitutional guarantees. For example, *Zandbergs v. Kuldīga District* involved a challenge to a water district's plan to condemn a large parcel of property for use as an impoundment to supply water for a hydroelectric station. The affected landowner argued that the plan violated the constitutionally-protected use of his private property. The water district countered that the project advanced the use of renewable energy resources, and therefore promoted its constitutional duty to promote a "benevolent environment." The court sided with the landowner, however, finding that the adverse affect on the landowner outweighed the environmental benefits of renewable energy production.

Courts elsewhere in Central and Eastern Europe have shown receptivity to environmental constitutionalism. Most notably, in *Eurogold*, the Turkish government agreed to allow the giant French mining conglomerate to use cyanide heap-leaching to mine gold and other metals from an centuries-old olive growing region in Turkey. After government-paid loggers began to remove olive trees, olive farmers brought a suit claiming that the government's license contravened Turkey's new constitutional environmental right "to live in a healthy, balanced environment." Turkey's highest administrative court agreed, stopping the operation in its tracks.

Often inspired by developments elsewhere, courts have upheld independent provisions, including in Portugal, where a court upheld "the right to a healthy and ecologically balanced human environment and the duty to defend it," and in South Korea, where a court interpreted an independent environmental rights provision as actionable, although it declined to find that the government's failure to regulate the use of loudspeakers used in furtherance of political campaigns to have violated the right.

Two provincial and lower courts in Ecuador have shown a willingness to vindicate that country's constitutional rights of nature. In *República del Ecuador Asamblea Nacional, Comisión de la Biodiversidad y Recursos Naturales, Acta de Sesión*, the Ecuadorian government invoked the constitutional rights of nature to stop illegal gold mining operations. The Interior Minister argued that the illegal mining that was polluting the Santiago, Bogotá, Ónzole, and Cayapas Rivers violated the rights of nature. The Second Court of Criminal Guarantees of Pichincha issued an injunction ordering the mining operations to cease immediately "for the protection of the rights of nature and of the people." Remarkably, to enforce the prohibition, the court ordered that the "armed forces of Ecuador and the national police should collaborate to control the illegal mining [in the area], including by destroying all of the items, tools, and other utensils [used in the mining activities] that constitute a grave danger to nature and that are found in the site where there is serious harm to the environment." A few days after the order, military forces dropped explosives from helicopters to destroy between 70 and 120 backhoes and other machinery by the miners.

But this decision was not without controversy: even some supporters of the enforcement of rights of nature questioned whether the judge should have subordinated the miners' property rights to the rights of nature. Importantly, however, following the dramatic events in this case, the government held hearings in which representatives from the region supported the military operation due to the "the dramatic and unhealthy situation that exists because of the mining contamination." Further illustrating the level of support for the rights of nature in all parts of the national government, the president of the National Assembly also testified at the hearings about the importance of "prioritizing the rights of the people to life and to health above the economic interests of the owners of the destroyed machinery."

The other Ecuadorian case vindicating the rights of nature to date –known as the *Wheeler* case – is much more typical of constitutional environmental rights. The issue in *Wheeler* was whether the provincial government’s construction and expansion of a highway in the mountains of southern Ecuador violated the constitutional rights of nature. Here, the provincial authorities commenced road construction without first completing an environmental impact assessment, securing planning permits for the construction, or planning for the proper disposal of rocks, sand, gravel, trees, and other excavation and construction debris. The debris was then discharged illegally along the banks of the Rio Vilcabamba, narrowing its width, quadrupling its rate of flow, and causing significant erosion and flooding in downriver areas, particularly during vernal rains. Affected landowners brought suit, invoking the constitutional rights of nature.

In a ruling unprecedented “in the history of humanity,” the provincial court agreed with the affected landowners, explaining: “[W]e cannot forget that injuries to Nature are ‘generational injuries’ which are such that, in their magnitude have repercussions not only in the present generation but whose effects will also impact future generations.” In support of this strong commitment to protecting the environment, the court quoted Alberto Acosta, who had been the President of the Constituent Assembly and largely responsible for the rights of nature provisions: “The human being is a part of nature, and [we] must prohibit human beings from bringing about the extinction of other species or destroying the functioning of natural ecosystems.” Remarkably, the court went so far as to say that rights of nature trump other constitutional rights because in its view a “healthy” environment is more important, and more pervasive, than any other constitutional right. In other words, and consistently with the illegal mining case, the court emphasized the need to protect the environment by all means necessary.

The provincial court in *Wheeler* not only gave substance to the constitutional rights of nature provision but also held that constitutionally prescribed procedural requirements were to be construed so as to ensure the full vindication of the rights of nature. In particular, the court concluded that the *acción de protección* (protective action) is the “only suitable and effective way” to address violations of the rights of nature given the “indisputable, elemental, and irremediable importance of Nature and taking into account how notorious and evident is its process of degradation.” The court also allowed the parties to introduce probabilistic evidence of environmental harm to support the action. And consistent with the Ecuadorian Constitution’s instruction that “the burden of proof on the inexistence of potential or actual damage rests with the person responsible for the activity (manager) or the defendant,” the court held that the defendant bears the burden of proof of showing lack of harm in cases involving the rights of nature.

Inviting other jurists to vindicate the rights of nature with a stiff spine, the court wrote that: “until it can be shown that there is no probability or danger to the environment of the kind of work that is being done in a specific place, it is the duty of constitutional judges to immediately guard and to give effect to the constitutional right of nature, doing what is necessary to avoid contamination or to remedy it.” To date, however, no other court has followed this mandate, despite the clear language

in the constitution requiring the state to “apply preventive and restrictive measures on activities that might lead to the extinction of species, the destruction of ecosystems, and the permanent alteration of natural cycles” or its obligation in cases of “severe or permanent environmental impact, including those caused by the exploitation of non-renewable natural resources” to “establish the most effective mechanisms to achieve [their] restoration...” This would be particularly appropriate in Ecuador, where oil extraction in the Amazon has caused profound environmental degradation and where what would be the world’s second largest metals mine is currently under development in the Condor region.

2. Dependent Environmental Rights

Some courts have recognized substantive environmental rights as dependent upon some other constitutional directive that advances good environmental governance, which we call dependent environmental rights. The Supreme Court of the Philippines has led the way in enforcing dependent environmental rights. In the celebrated case of *Minors Oposa v. Factoran*, attorney, writer, and law professor Tony Oposa filed a lawsuit on behalf of his children, his friend’s children, and generations to come to “prevent the misappropriation or impairment’ of Philippine rainforests and ‘arrest the unabated hemorrhage of the country’s vital life-support systems and continued rape of Mother Earth.” At one time, the Philippines contained nearly 100 million acres of verdant, ancient forests. By the 1990s, commercial logging had reduced this by about ninety-nine percent. The plaintiffs claimed that the government’s continued issuance of “timber licensing agreements” violated the country’s recently minted constitutional directive that, *inter alia*, “[t]he State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature.”

In reversing the trial court, the Supreme Court upheld Oposa’s constitutional claim, and also found that the plaintiffs had standing to represent themselves, their children, and posterity. In a sweeping pronouncement, the Court determined that rights to a quality environment are enforceable notwithstanding whether they are constitutionally expressed because they “exist from the inception of humankind.”

As a matter of fact, these basic rights need not even be written in the constitution for they are assumed to exist from the inception of humankind. If they are now explicitly mentioned in the fundamental charter it is because of the well-founded fear of its framers that unless the rights to a balanced and healthful ecology and to health are mandated as State policies by the constitution itself, thereby highlighting their continuing importance and imposing upon the State a solemn obligation to preserve the first and protect and advance the second, the day would not be too far when all else would be lost not only for the present generation, but also for those to come – generations which stand to inherit nothing but parched earth incapable of sustaining life.

More recently, in *Metropolitan Manila Development Authority v. Concerned Residents of Manila Bay*, the same court upheld a request for multifaceted injunctive relief by the same lawyer as in *Minors Oposa* to prevent massive pollution discharges from choking Manila Bay, and to clean and protect it for the benefit of future generations.

Concerned Residents of Manila is particularly instructive about the potential of environmental constitutionalism. Manila Bay, located in southwest Luzon in the Philippines, is a natural wonder. Its 1800 square kilometers contain some of the most diverse biodiversity in Southeast Asia. If ever an area could be described as “teeming” with marine and terrestrial life, it is Manila Bay. The area has a rich strategic history. It is where the U.S. Navy, led by Commodore George Dewey, fought and landed in the siege of Manila at the outset of the Spanish American War in 1898. Japanese forces occupied the Philippines after prevailing in a fierce battle with U.S. and Filipino forces at the beginning of World War II. By the end of the war in 1945, nearly all of Manila lay in ruins.

Given its natural beauty, tropical climate, and strategic location, Manila Bay supports a high population density. Twenty million people live in metropolitan Manila. Indeed, Manila City is the most densely populated city in the world, with 43,079 people per square kilometer. Manila Bay’s 190 kilometers of coastline also boast significant industrial, commercial, and residential development and extensive international portage. Not surprisingly, then, Manila Bay is also teeming with pollution from farms, factories, urban runoff, combined sewer overflow, landfills, watercraft, cars, tankers, and trucks, coupled with poor municipal waste planning, poor plumbing, and unlawful or haphazard waste dumping along the bay’s tributaries. Most of it ends up in Manila Bay, exceeding the carrying capacity of the ecological system to withstand, rebound, and recover.

In 1999, a group of fourteen young Filipinos—*sub nom.* Concerned Residents of Manila Bay—filed a lawsuit against ten executive departments and agencies for neglecting to protect Manila Bay and to clean and protect the bay for the benefit of future generations. The plaintiffs alleged that they have a constitutional guarantee to a quality environment. In *Concerned Residents of Manila Bay*, the Philippine Supreme Court upheld the lower court’s decisions to grant the citizen’s request to enjoin the government from issuing any further permits to pollute Manila Bay.

These cases serve as an important model for other courts to follow, particularly for those construing policy directives that complement substantive rights to a quality environment. What other courts should take away from these cases is that environmental rights provisions provide jurisprudential footing for advancing environmental concerns.

3. Derivative Environmental Rights

Some courts have held that other substantive constitutional rights, including a right to life, harbor environmental rights. Most notably, apex courts in India, Pakistan, Bangladesh, and Nepal have each read a constitutional “right to life” in tandem with directive principles aimed at promoting environmental policy to embody a

substantive environmental right. Among these countries, India has been particularly active.

In 1984, the Supreme Court of India was one of the first to find that a “right to life” embeds a right to a quality environment. In *Subhash Kumar v. State of Bihar*, the plaintiffs brought an action to stop tanneries from discharging into the Ganges River. While the Court dismissed the action for lack of standing, it observed: the “[r]ight to life is a fundamental right under Article 21 of the Constitution and it includes the right of enjoyment of pollution free water and air for full enjoyment of life.” Subsequently in *M.C. Mehta v. Union of India*, the Court ordered the tanneries to shut down unless effluent was first subjected to pretreatment processes approved by the governing environmental agency, privileging, as we have seen, life, health, and ecology over the more tangible benefits of employment and revenue. *Charan Lal Sahu v. Union of India* involved a challenge to the Bhopal Gas Disaster Act, the federal government’s response to the Bhopal disaster wherein more than 3,000 people died following exposure to Methyl Isocyanate from a storage tank operated by Union Carbide (India). The petitioners – some parties adversely affected by the incident – objected to the federal government’s exclusive assumption of claims as *parens patriae* on behalf of affected parties, a majority of who were poor and illiterate. In upholding the Act, the Supreme Court of India interpreted the right to life guaranteed by Article 21 of the Constitution to include the right to a wholesome environment.

Courts in Pakistan have reached the same conclusion. The Supreme Court of Pakistan has held that environmental rights are embedded within that country’s constitutional right to life. In *In re: Human Rights Case (Environmental Pollution in Balochistan)*, the Court took judicial notice of a newspaper report that, “business tycoons are making attempts to purchase coastal area of Balochistan and convert it into dumping ground” for nuclear and highly hazardous waste. Without much discussion of the scope of the constitutional rights involved, the Court ordered the agency charged with implementing environmental laws in the area to monitor land allocations in the affected area and forbid such use. In *West Pakistan Salt Miners v. Industries and Mineral Development, Punjab, Lahore*, the Court upheld a claim that the right to life included a right to water free from contamination from mining activities: “[t]he right to have unpolluted water is the right of every person wherever he lives.” And in *Ms. Shehla Zia et al. v. WAPDA*, the court held that a constitutional right to life provides cause of action for electromagnetic hazards associated with the construction of a power plant.

A decision from the Supreme Court of Nepal presents a clear statement of how environmental concerns derive from a constitutionally recognized right to life. In *Godavari Marble*, the Nepalese Supreme Court held “since a clean and healthy environment is an indispensable part of a human life, the right to a clean, healthy environment is undoubtedly embedded within the Right to Life.” The Court wrote:

The works carried out by the respondent Godawari Marble Industries have been disbalanced to the environment. The dust and sand

produced during the explosions which is being undertaken in the mining process has polluted the atmosphere and water of the area and caused deforestation. Due to the continuing environmental degradation and pollution created by the said industry, Right to Life of the people has been violated. The absence of appropriate environment caused diminution of human life.”

And in *Yogi Narahari Nath and others v. Honourable Prime Minister Girija Prasad Koirala and others*, the Court issued an injunction to stop the government from granting a lease to establish a College of Medical Science on the site of an environmentally and archaeologically significant piece of land. The Court found that the lease would infringe the constitutional “right to life,” which it held implicitly includes the right to a pollution-free environment: “the environment is an integral part of human life.” Moreover, in *Advocate Kedar Bhakta Shrestha v. HMG, Department of Transportation Management*, the court found that the constitutional “right to life” guarantees a right to a quality environment. In a reverse environmental rights action of sorts, petitioners claimed that the government’s ban on the use of “tempo,” three-wheeled diesel-engine-run vehicles that were a principal source of air pollution in Kathmandu, violated their right to carry on a trade or business. The Court upheld the governmental action, reasoning that personal freedom to carry on business practices yields to environmental rights embodied in the constitution’s “right to life”: “[e]very individual has an inherent right to live in a healthy environment.” These cases suggest a willingness to derive environmental rights from a constitutional right to life in the Nepalese constitution.

In Bangladesh, too, the Supreme Court has held that a right to a quality environment derives from a constitutional guarantee to a “right to life,” although in two significant cases, despite sympathetic language, the court dismissed the actions for lack of standing. In *Dr. Mohiuddin Farooque v. Bangladesh*, the petitioner alleged that the implementation of a substantial flood control plan would so disrupt the affected community’s life, property, and environmental security as to violate a constitutional “right to life.” The Supreme Court of Bangladesh held that the Constitution’s guarantee of a “right to life” included environmental rights, reasoning: “Articles 31 and 32 of our Constitution protect[s] right to life as a fundamental right. It encompasses within its ambit, the protection and preservation of the environment, ecological balance free from pollution of air and water, and sanitation, without which life can hardly be enjoyed. An act or omission contrary thereto will be violative of the said right to life.” Nonetheless, the court dismissed the action, reasoning that petitioners did not have standing within the meaning of Constitution. And in *Subash Kumar v. State of Bihar*, it held that pollutant discharges sufficient to make the Bokaro River in the State of Bihar unfit for drinking and irrigation could abridge a constitutional “right to life.” The Court held that the “right to life” includes the enjoyment of water and air free of pollution. Nonetheless, the Court dismissed the action, holding that the petitioner was motivated by self-interest and thus did not have standing to file a petition on behalf of the public interest.

A court in Hong Kong recently accepted that a prima facie case could be made that a deteriorated environment infringed upon constitutionally guaranteed rights to health

and life. In *Clean Air Foundation v. Government of HKSAR*, plaintiffs alleged that the provincial government of Hong Kong's failure to adequately protect air quality in Hong Kong amounted to a violation of constitutional rights to health and life. Here, while the government prohibited the sale of diesel fuel, it did not prohibit its use or importation. The plaintiffs alleged that this contributed to soot levels nearly three times higher than that of New York City. The Court of First Instance found "that it is at least *prima facie* arguable that the constitutional right to life may apply." Yet it found the matter to be essentially one of policy consigned to the political process, observing: "[h]ow possibly can this court decide that this decision fails to reach a fair balance between the duty Government has to protect the right to life and the duty it has to protect the social and economic well-being of the Territory? It cannot do so"

Apex courts in South America have also been willing to construe environmental rights from other constitutional prerogatives although in many of these countries the constitutions also create substantive environmental rights, which would seem to suggest even surer interpretive footing. The Constitutional Court of Colombia has read a constitutional "right to life" as encompassing a substantive right to a healthy environment. In *Fundepublico v. Mayor of Bugalagrande y otros*, the Constitutional Court of Colombia wrote that "[i]t should be recognized that a healthy environment is a *sine qua non* condition for life itself and that no right could be exercised in a deeply altered environment." In *Maria Elena Burgos v. Municipality of Campoalegre (Huila)*, the Court upheld a lower court's order to destroy pig stalls that caused neighbors to fall ill with respiratory distress and fever, finding they constituted an actionable violation of the country's fundamental environmental right encompassed in a right to life. And in *Victor Ramon Castrillon Vega v. Federacio Nacional de Algodoneros*, the Court found that emissions of toxic fumes from an open pit contravened a constitutional right to life and ordered a company to remediate the pit and pay medical expenses. In reaching these results, the Court has conceived the right to the environment as "a group of basic conditions surrounding man, which define his life as a member of the community and allow his biological and individual survival[.]" Thus, environmental rights exist, "side by side with fundamental rights such as liberty, equality and necessary conditions for people's life [W]e can state that the right to the environment is a right fundamental to the existence of humanity." Even in *Jose Cuesta Novoa v. the Secretary of Public Health of Bogota*, which confirmed on procedural ground a lower court's dismissal of an effort to enforce environment rights, the Court still recognized that a right to life embodies environmental protections. Likewise, as previously mentioned, the Supreme Court in Chile upheld the right of a farmer to bring a constitutional right to life claim to enjoin the drainage of Lake Chungarà in *Comunidad de Chanaral v. Codeco División el Saldor*. These cases demonstrate the potential of vindicating substantive environmental rights derived from other constitutional provisions.

Yet for the most part, apex courts elsewhere have declined to infer that other rights, such as a right to life, include a substantive right to a quality environment. For example, in the United States, while the Supreme Court has never addressed the issue directly and is not likely to do so any time soon, courts have rejected the

position that constitutional rights to “liberty” or “life” provide an implied or penumbral right to a clean environment. Even where the duty is clear, courts have sometimes been reluctant to recognize an enforceable environmental constitutional right.

The Federal Supreme Court of Switzerland, for example, declined to read a constitutional passage that the “federal legislature enacts laws concerning the protection of man and his natural environment against detrimental or burdensome influences” as one that confers a fundamental environmental right. Apex courts in other countries, including The Netherlands (“It shall be the concern of the authorities to keep the country habitable and to protect and improve the environment”), and Greece (“The protection of the natural and cultural environment constitutes a duty of the State”), have declined to infer environmental rights into constitutional provisions requiring sound environmental policy.

4. Dormant Environmental Rights

Courts in some countries have yet to engage environmental rights provisions, sometimes for failure to hear such cases at all, sometimes by denying them any force, and sometimes due to the sheer tower of economic, political and other forces discussed previously, thereby rendering them dormant.

The Constitutional Court of Turkey, for example, has interpreted the constitutional provision that “[e]veryone has the right to live in a healthy, balanced environment,” as permitting solely facial challenges to legislation, notwithstanding its orbit with other “Social and Economic Rights and Duties.” Courts in Spain have held that the constitutional “right to enjoy an environment suitable for the development of the person,” falls outside the actionable private “rights” the constitution otherwise guarantees. Likewise, Namibia’s environmental rights provision may only be enforced by an ombudsman, and citizens of Cameroon are not allowed to pursue environmental rights before the country’s Constitutional Court. While South Africa’s constitution guarantees a fundamental right to a clean environment, functionally open standing, and access to a constitutional court, that court has yet to enforce the right. Brazil’s Constitution, with its aim to protect the Amazon Rain Forest, has among the most detailed environmental provisions of all national constitutions. Yet, it is doubtful whether its promise that all have “the right to an ecologically balanced environment, which is a public good for the people’s use and is essential for a healthy life” will be enforced fully. Brazil’s environmental constitutional provisions are yielding to high foreign debt and reliance on timber, crop, and cattle farming. Environmental rights provisions in Ecuador have underperformed for similar reasons. Likewise, environmental rights provisions in most of the former Soviet Bloc lie fallow in part because of economic, political, and social challenges.

Sometimes, environmental provisions expressed as directive principles are thought too weak to be worth litigating to advance individual environmental rights.

Thus, the majority of constitutional provisions purporting to advance substantive environmental constitutionalism have yet to be engaged meaningfully by domestic courts.

This reluctance to engage environmental rights provisions is a function of the challenges courts face, including interpretation, equities, and the difficulties of balancing environmental interests against equally important social, political, and economic interests, countries where environmental constitutionalism is dormant may benefit from comparative considerations.

From a comparative perspective what is to be observed is that courts across the globe are being called upon to adjudicate constitutional environmental rights with increasing frequency. Overall, cases from around the globe show that courts are engaging constitutional environmental rights provisions robustly, and as such are an increasingly potent force in the expansion of environmental constitutionalism globally.

C. Reference Materials

The decisions that follow provide examples of decisions to enforce independent and dependent rights, including *La Camoaronera en la Reserva Ecologica* and *Fadeyeva v. Russia*, well as environmental rights derived from a right to life, exemplified by *M.C. Mehta v. Union of India*.

1. La Camaronera en la Reserva Ecológica (Ecuador, 2015)

SENTENCIA N.0 166-15-SEP-CC CASO N.0 0507-12-EP

CORTE CONSTITUCIONAL DEL ECUADOR

Quito, D. M., 20 de mayo de 2015

I. ANTECEDENTES

Resumen de admisibilidad

La presentación extraordinaria de protección fue interpuesta por el señor Santiago García Llore en calidad de director provincial del Ministerio del Ambiente de Esmeraldas, quien compareció el 07 de octubre de 2011 ante la Sala Única de la Corte Provincial de Justicia de Esmeraldas, la cual dictó sentencia, el 09 de septiembre de 2011, dentro de la acción de protección N.0 281-2011 or media de la providencia dictada el 17 de octubre de 2011, la Sala de Conjuces de la Corte Provincial de Justicia de Esmeraldas resolvió remitir el Expediente de la Corte Constitucional....

Pretension concreta

Con los antecedentes expuestos, el accionante solicita a esta Corte Constitucional lo siguiente:

De conformidad con el artículo 62 de la Ley Orgánica de Garantías Jurisdiccionales y Control Constitucional, con la exposición efectuada, he referido de forma clara y concreta la violación constitucional cometida por la autoridad judicial, debiendo aclarar que dicha acción permitiera solventar la transgresión constitucional acaecida en el presente caso, a fin de establecer un precedente que nos permita ejercer a plenitud el respeto a la naturaleza y al buen vivir, siendo hoy en día de trascendencia y relevancia nacional asuntos como estos que preocupan a toda la colectividad.

II. CONSIDERACIONES Y FUNDAMENTO DE LA CORTE CONSTITUCIONAL

Competencia

La Corte Constitucional es competente para conocer y resolver sobre las acciones extraordinarias de protección contra sentencias, autos definitivos y resoluciones con fuerza de sentencia de conformidad con lo previsto en los artículos 94 y 437 de la Constitución de la República en concordancia con los artículos 63 y 191 numeral 2 literal de la Ley Orgánica de Garantías Jurisdiccionales y Control Constitucional, de acuerdo con el artículo 3 numeral 8 literal y tercer inciso del artículo 35 del Reglamento de Sustanciación de Procesos de Competencia de la Corte Constitucional....

Naturaleza jurídica y objeto de la acción extraordinaria de protección

Como ya se lo ha señalado en reiterados pronunciamientos, la Corte Constitucional, por medio de la acción extraordinaria de protección, se pronunciara respecto de dos cuestiones principales: la vulneración de derechos constitucionales o la violación de normas del debido proceso. En este orden, todos los ciudadanos, en forma individual o colectiva, podran presentar una acción extraordinaria de protección contra decisiones judiciales en las cuales, se hayan vulnerado derechos reconocidos en la Constitución. Mecanismo previsto para que la competencia asumida por los jueces este subordinada a los mandatos del ordenamiento supremo y ante todo respeten los derechos de las partes procesales.

La acción extraordinaria de protección procede exclusivamente en contra sentencias o autos definitivos en los que por acción o omisión, se haya violado el debido proceso o otros derechos constitucionales reconocidos en la Constitución, una vez que se hayan agotado los recursos ordinarios y extraordinarios dentro del termino legal a menos que la falta de interposición de estos recursos no fuera atribuible a negligencia de la persona titular del derecho constitucional vulnerado, conforme lo previsto en el artículo 94 de la Constitución de la Republica.

Determinación y desarrollo del problema jurídico

La Corte constitucional, en el presente caso, debe determinar si la decision impugnada ha vulnerado derechos constitucionales, ante lo cual, estima necesario sistematizar su argumentación a partir del siguiente problema juridico:

La sentencia dictada por la Sala Unica de la Corte Provincial de Justicia de Esmeraldas, el 09 de septiembre de 2011, vulnera el derecho al debido proceso en la garantia de la motivación de las resoluciones de los poderes publicos?

En la demanda de acción extraordinaria de protección planteada por Santiago Garcia Llore en calidad de director provincial del Ministerio del Ambiente, se establece en lo principal que la sentencia dictada por la Sala Unica de la Corte Provincial de Justicia de Esmeraldas, el 09 de septiembre de 2011, carece de motivación por cuanto los jueces al aceptar la acción de protección y reconocer el aparente derecho del señor Manuel Meza Macias a mantener la camaronera de su propiedad denominada "MARMEZA" dentro de la Reserva Ecológica Manglares Cayapas-Mataje, desconocieron la declaratoria de area protegida de esta zona y por consiguiente, inobservaron las disposiciones constitucionales que consagran los derechos de la naturaleza.

En función de dichos argumentos, esta Corte pasará a analizar si la sentencia impugnada vulnera la garantía del debido proceso relacionada a la motivación de las sentencias, la misma que se encuentra consagrada en el artículo 76 numeral 7 literal I de la Constitución de la Republica que expresamente, señala:

Art. 76 - En todo proceso en el que se deterrinen derechos y obligaciones de cualquier ordene, aseguran el derecho al debido proceso que incluni las siguientes garantias basicas! (...).

7. El derecho de las personas ala defensa incluire las siguientes garantias:

(I) Las resoluciones de los poderes publicos deben ser motivadas. No habra motivación si en la resolución no se enuncian las normas o principios juridicos en que se funda y no se explica la pertinencia de su aplicación a los antecedentes de hecho. Los aretas administrativas, resoluciones o fallos que no se encuentren debidamente motivados se considraran nulos. Las servidoras o servidores responsables seran sancionados.

Partiendo de esta disposición constitucional debe entenderse a la motivacion como un mecanismo que busca asegurar la racionalidad de las decisiones emanadas de los organismos que ejercen potestades publicas. Es decir, es la garantia del debido proceso que permite a quienes son los directamente afectados por una decision o a la sociedad en general, tener la certeza de que la resolución judicial, en este caso, responde a una justificacion debidamente razonada....

...Esta exigencia persigue una doble finalidad, por un lado controlar la arbitrariedad del sentenciador, pues le impone el deber de justificar el razonamiento logico que siguio para establecer una conclusion y ademas, garantizar el ejercicio efectivo del derecho de la defensa de las partes, considerando que estas requieren conocer los motivos de la decision para determinar si estan conformes con ella....

La Corte Constitucional a través de sus pronunciamientos en sentencias anteriores, ha señalado que para verificar si una sentencia se encuentra debidamente motivada acorde a los parametros constitucion les deben concurrir tres requisitos elementales como son la razonabilidad, lógica y comprensibilidad....

En el caso que nos ocupa, el accionante argumenta la falta de motivación de la sentencia impugnada en cuanto los jueces provinciales han desconocido los derechos de la naturaleza reconocidos por la Constitución de la Republica, haciendo referenda especificamente a lo establecido en los artículos 71, 72 y 73 de la Normal Suprema.

Ahora bien, los derechos de la naturaleza constituyen una de las innovaciones mas interdantes y relevantes de la Constitución actual, pues se aleja de la concepcion tradicional "naturaleza-objeto" que considera a la naturaleza como propiedad y enfoca su proteccion exclusivamente a través del derecho de las personas a gozar de un ambiente natural sano, para dar paso a una noción que reconoce derechos propios a favor de la naturaleza. La novedad consiste entonces en el cambio de paradigma sobre la base del cual, la naturaleza, en tanto ser vivo, es considerada un sujeto titular de derechos. En este sentido, es importante resaltar

que la Constitución de la República consagra una doble dimensionalidad sobre la naturaleza y al ambiente en general, al concebirla no solo bajo el tradicional paradigma de objeto de derecho, sino también como un sujeto, independiente y con derechos específicos o propios.

Lo anterior refleja dentro de la relación jurídica naturaleza-humanidad, una visión biocéntrica en la cual, se prioriza a la naturaleza en contraposición a la clásica concepción antropocéntrica en la que el ser humano es el centro y medida de todas las cosas donde la naturaleza era considerada una mera proveedora de recursos. Esta nueva visión adoptada a partir de la vigencia de la Constitución de 2008, se pone de manifiesto a lo largo del texto constitucional, es así que el preámbulo de la Norma Suprema establece expresamente que el pueblo soberano del Ecuador: "Celebrando a la naturaleza, la Pacha Mama, de la que somos parte y que es vital para nuestra existencia" ha decidido construir una nueva forma de convivencia ciudadana en diversidad y armonía con la naturaleza, para alcanzar el buen vivir o *sumak kawsay*. De esta manera el *sumak kawsay* constituye un fin primordial del Estado, donde esta nueva concepción juega un papel trascendental en tanto promueve un desarrollo social y económico en armonía con la naturaleza. Es así que la importancia de la naturaleza dentro de este nuevo modelo de desarrollo se ve plasmada en el artículo 10 de la Constitución de la República que consagra: "Las personas, comunidades, pueblos, nacionalidades y colectivos son titulares y gozarán de los derechos garantizados en la Constitución y en los instrumentos internacionales. La naturaleza será sujeto de aquellos derechos que le reconozca la Constitución". Así, el Ecuador se convierte en el primer país en reconocer y amparar constitucionalmente los derechos de la naturaleza.

De igual manera, la Constitución de la República, dentro del Título VII del Régimen del Buen Vivir, en su Capítulo Segundo, recoge e incorpora una serie de instituciones y principios orientados a velar por los derechos de la naturaleza, entre los cuales se destacan, la responsabilidad objetiva y el principio de precaución, la actuación subsidiaria del Estado en caso de daños ambientales, la participación ciudadana, el sistema nacional de áreas protegidas entre otras.

En ese mismo sentido, el artículo 71 de la Constitución, ubicado dentro del capítulo denominado Derechos de la Naturaleza, empieza por identificar a la naturaleza con la denominación alterna de Pacha Mama, definiéndola como el lugar donde se reproduce y realiza la vida, y reconociéndole el derecho al respeto integral de su existencia y al mantenimiento y regeneración de sus ciclos vitales, estructura, funciones y procesos evolutivos. Desde esta perspectiva, prevalece la protección de la naturaleza tanto en el conjunto de sus elementos (integralidad) como en cada uno de ellos individualmente considerados (ciclos vitales, estructura, funciones y procesos evolutivos). La disposición constitucional en referencias, señala:

Art. 71. La naturaleza o Pacha Mama, donde se reproduce y realiza la vida, tiene derecho a que se respete integralmente su existencia y el mantenimiento y regeneración de sus ciclos vitales, estructura, funciones y procesos evolutivos.

Toda persona, comunidad, pueblo o nacionalidad podrá exigir a la autoridad pública el cumplimiento de los derechos de la naturaleza. Para aplicar e interpretar estos derechos se observa a los principios establecidos en la Constitución, en lo que proceda.

El Estado incentiva a las personas naturales y jurídicas, y a los colectivos, para que protejan la naturaleza, y promoven el respeto a todos los elementos que forman un ecosistema.

Conforme se puede apreciar de la norma constitucional transcrita, es importante anotar que los ciudadanos cumplen un papel fundamental a la hora de proteger los derechos de la naturaleza, dado que toda persona puede exigir a las autoridades administrativas y judiciales la observancia y cumplimiento de sus derechos, para lo cual, el Estado es el llamado a promover la participación ciudadana para el ejercicio de mecanismos enfocados a su protección. En este sentido, todos los ciudadanos gozamos de legitimación activa para representar a la naturaleza cuando sus derechos esten siendo conculcados.

Bajo este contexto, el reconocimiento de la naturaleza como sujeto de derechos, incluye también el derecho de esta a la restauración, lo que implica la recuperación o rehabilitación de la funcionalidad ambiental, de sus ciclos vitales, estructura y sus procesos evolutivos, sin considerar las obligaciones adicionales de carácter económico que el responsable del daño deba cancelar a quienes dependan de los sistemas naturales afectados. Este derecho, se refiere entonces no a la reparación pecuniaria a favor de las personas perjudicadas, sino a la *restitutio in integrum*, es decir, a la plena restitución de la naturaleza mediante la reparación de los daños producidos en el medio físico hasta regresar en lo posible el ecosistema original, es decir, la restauración debe estar encaminada hacia el aseguramiento que el sistema natural vuelva a gozar de condiciones que permitan el correcto desenvolvimiento en relación a sus ciclos vitales, estructura, funciones y procesos evolutivos.

El derecho a la restauración se encuentra previsto en el artículo 72 de la Norma

Suprema, que establece:

Art. 72.- La naturaleza tiene derecho a la restauración. Esta restauración será independiente de la obligación que tienen el Estado y las personas naturales o jurídicas de indemnizar a los individuos y colectivos que dependan de los sistemas naturales afectados.

En los casos de impacto ambiental grave o permanente, incluidos los ocasionados por la explotación de los recursos naturales no renovables, el Estado establecerá los mecanismos más eficaces para alcanzar la restauración, y adoptará las medidas adecuadas para eliminar o mitigar las consecuencias ambientales nocivas.

Este derecho a la restauración, además, se encuentra relacionado con la obligación del Estado de establecer mecanismos eficaces que permitan la recuperación de los espacios naturales degradados.

De las disposiciones anotadas, se desprende claramente el cambio de concepción instaurado por el nuevo sistema constitucional ecuatoriano que a más de considerar a la naturaleza como sujeto de derechos, dota de transversalidad sobre todo el ordenamiento jurídico a los derechos reconocidos a la Pacha Mama. Es decir, todas las actuaciones del Estado, así como de los particulares, debe hacerse en observancia y apego con los derechos de la naturaleza. Julio Prieto Mendez señala que el principio de transversalidad de los derechos de la naturaleza se encuentra plasmado expresamente en los artículos 83 numeral 6 y 395 numeral 2 de la Constitución, que establecen:

Art. 83.- Son deberes y responsabilidades de las ecuatorianas y los ecuatorianos, sin perjuicio de otros previstos en la Constitución y la ley: (...)

6. Respetar los derechos de la naturaleza, preservar un ambiente sano y utilizar los recursos naturales de modo racional, sustentable y sostenible.

Art. 395.- La Constitución reconoce los siguientes principios ambientales: (...)

2. Las políticas de gestión ambiental se aplicarán de manera transversal y serán de obligatorio cumplimiento por parte del Estado en todos sus niveles y por todas las personas naturales o jurídicas en el territorio nacional.

Así el autor resalta el carácter *erga omnes* que reviste a la obligación de respetar y velar por los derechos de la naturaleza e indica que "adicionalmente veremos que esta transversalidad se aplica no solo específicamente a las políticas en gestión ambiental ni a las obligaciones del Estado para mitigar el cambio climático, sino a las de salud, educación y otras más, dejando reflejar la manifestación de esta transversalidad en un verdadero entramado normativo. (...). En efecto, los derechos de la naturaleza, al igual que los derechos humanos reconocidos en el entramado constitucional -sin perjuicio de los que integran el bloque de constitucionalidad- son derechos constitucionales, y en esa medida deberán ser interpretados y aplicados conforme a la Constitución".

De tal manera, que el carácter constitucional reconocido a los derechos de la naturaleza, conlleva de forma implícita la obligación del Estado a garantizar su goce efectivo, recayendo, específicamente, dentro de los órganos judiciales la tarea de velar por la tutela y protección de estos, en aquellos casos sometido a su conocimiento y donde puedan resultar vulnerados.

En el caso objeto de estudio se observa que la sentencia emitida el 09 de septiembre de 2011 por la Sala Unica de la Corte Provincial de Justicia de Esmeraldas, dentro del recurso de apelación de acción de protección N.0 29.457, comienza por enunciar en su *ratio decidendi*, identificada en el considerando cuarto, que el punto en disputa se refiere por un lado, al derecho constitucional a la propiedad garantizado en el artículo 66 numeral 26 y artículo 32 de la Constitución y por otro lado, al derecho a la seguridad jurídica contenido en el artículo 821 de la Constitución de la República. Posteriormente, señala la autoridad jurisdiccional en el considerando septimo del fallo que se examina, que de conformidad con el artículo 14 de la Declaración Americana de los Derechos y Deberes del Hombre, se garantizan los derechos al trabajo y a la remuneración. Así, concluye que la vulneración del derecho a la propiedad por parte del Ministerio del Ambiente, vulnera paralelamente las formas de organización de la producción en la economía y el derecho constitucional al trabajo del señor Manuel Meza Macias en la medida en que la camaronera constituye su fuente de ingresos.

Acto seguido, la Sala sin más reflexiones decide rechazar el recurso de apelación interpuesto y confirmar la sentencia venida en grado; esto es, la conservación de la camaronera MARMEZA dentro de la Reserva Ecológica Cayapas-Mataje. De esta manera y una vez identificados los principales argumentos que sirvieron de sustento a la *decisum* de la sentencia que se impugna, resulta evidente que la Sala Unica de la Corte Provincial de Justicia de Esmeraldas decidió el caso sometido a su conocimiento, analizando, exclusivamente, el derecho a la propiedad y el derecho al trabajo.

Planteados así los argumentos contenidos en la sentencia impugnada, se advierte que la autoridad jurisdiccional en este caso, no examinó en ningún momento la existencia o no de una vulneración a los derechos constitucionales de la naturaleza, así como tampoco se observa ningún esfuerzo por comprobar si los derechos presuntamente vulnerados estaban en contraposición con los derechos reconocidos constitucionalmente a la naturaleza, conforme se alegó por parte de la entidad accionante al interponer el recurso de apelación. Por el contrario, la ausencia de análisis, e incluso de enunciación, respecto a los derechos que la Carta Magna consagra a favor de la naturaleza, dentro de un proceso que involucra esencialmente la protección y conservación de una reserva ecológica, revela una absoluta negación del reconocimiento de esta zona como área protegida y de forma simultánea, una negación del reconocimiento del derecho de las personas a vivir en un ambiente sano y ecológicamente equilibrado.

Esta Corte Constitucional ha sido enfática al señalar la importancia de los derechos de la naturaleza que derivan en la obligación del Estado y sus funcionarios de incentivar y promover el respeto a todos los elementos que forman parte de un ecosistema, y el derecho a que se respete a la naturaleza en su integralidad. Aspecto que evidentemente no ha sido observado por los jueces de la Sala Unica de la Corte Provincial de Justicia de Esmeraldas, quienes no analizaron, a pesar de su pertinencia evidente, la existencia o no de vulneraciones a los derechos de la naturaleza dentro de un proceso en que la cuestión central constituía la conservación o no de una camaronera dentro de la Reserva Ecológica Cayapas-

Mataje, esta última poseedora de un sistema de manglar con gran diversidad de especies de fauna y flora.

Bajo este contexto, el análisis de los juzgadores en arden a garantizar la tutela efectiva de los derechos de la naturaleza, esto es, el respeto integral a su existencia, mantenimiento y regeneración de sus ciclos vitales, estructura, funciones y procesos evolutivos, debió incluir el estudio de los potenciales impactos que genera en la naturaleza el proceso de producción en la acuicultura del camarón, tanto en la ubicación, diseño y construcción de las piscinas como en la operación de las mismas, mas aún, cuando en el caso en concreto dicha actividad es realizada dentro de una zona declarada como reserva ecológica. En tal virtud, resulta extraño que escapara al razonamiento judicial en la sentencia impugnada, los significativos impactos ambientales que generan las camaroneras en ecosistemas frágiles, tales como las zonas protegidas con ecosistemas de manglar; en tanto, la operación de estas ocasiona una innegable transformación del habitat natural a través de la intrusión de agua salada en los acuíferos de agua dulce, la introducción de nuevas especies y enfermedades en el ecosistema, las desviaciones de flujos por taponamiento de las piscinas, entre otros.

Es preciso resaltar además, que al tratarse de una reserva ecológica, el lugar donde se encuentra ubicada la camaronera MARMEZA, representa un área natural de patrimonio del Estado, cuya administración corresponde al Ministerio del Ambiente. Además, de acuerdo a la legislación que regula la materia las áreas naturales declaradas como reservas ecológicas deben conservarse inalteradas, constituyen un patrimonio inalienable e imprescriptible y no puede constituirse sobre ellas ningún derecho real. Del examen del fallo objeto de la presente acción, no se constata que la Sala haya estimado las potenciales consecuencias que podrían poner en peligro la integridad física del área protegida y/o las prohibiciones de constitución de derechos reales sobre una reserva ecológica en observancia a las normas constitucionales que consagran el respeto integral a la existencia y mantenimiento de la naturaleza.

En función de lo expuesto, esta Corte evidencia que el examen realizado por los jueces provinciales dentro del presente caso, se muestra totalmente apartado de la normativa constitucional desarrollada en torno al derecho a la naturaleza. Por lo tanto, al constatarse un asistemático de los derechos alegados por el propietario de la camaronera MARMEZA, en contraposición a los derechos a la naturaleza reconocidos en la Constitución de la República, se advierte que el estudio efectuado por los jueces de la Sala Única de la Corte Provincial de Justicia de Esmeraldas desnaturaliza los postulados constitucionales que respeto integral a la existencia y mantenimiento de las áreas específicamente en el Capítulo VII de la Norma Suprema.

En suma, esta situación configura la ausencia de un desarrollo argumentativo ajustado a la normativa constitucional vigente; por lo que, la Corte determina que la sentencia impugnada dentro de la presente de protección, carece de **razonabilidad**.

En lo que respecta a la lógica, este elemento debe ser entendido como la interrelación de causalidad que debe existir entre los presupuestos normas jurídicas aplicadas al caso y por consiguiente, con la adoptada por los jueces. Es decir, nos referimos a lo que este ha definido como la coherencia materializada entre las premisas fácticas, premisas normativas y la conclusión obtenida. Partiendo de esta definición, en orden a determinar si la sentencia impugnada se encuentra motivada de acuerdo al parametro de la lógica, es necesario identificar los presupuestos de hecho, las normas jurídicas que han sido aplicadas por parte de los juzgadores y la decisión adoptada; para así, establecer si existe una relación coherente entre estos elementos.... Finalmente, en lo que respecta a la conclusión, se evidencia que el Tribunal de Apelación determina la vulneración de los derechos a la propiedad y al trabajo, y en función de ella, confirma la sentencia subida en grado.

Luego de examinar las premias facticas y las premisas normativas en el caso *sub júdice*, resulta notorio la ausencia de interrelacion entro estos elementos, toda vez que no se constata que los jueces al dictar la sentencia impugnada contemplen los argumentos del accionante y analicen normativa referente a los derechos de la naturaleza, como correspondia hacerlo, en orden a establecer una línea coherente de causalidad entre los presupuesto de hecho y la normativa aplicada en la decisión judicial, que por consiguiente, permita, a su vez, arribar a una conclusion consecuente a las premisas del caso. Este aspecto, hace evidente la falta de coherencia lógica de la sentencia impugnada, en cuanto no se verifica una correcta vinculación de las disposiciones normativas invocadas por los jueces de la Sala Unica de la Corte Provincial de Justicia de Esmeraldas respecto de todas las premisas facticas del caso, particularmente en lo que concierne a la alegada vulneración a los derechos de la naturaleza. Baja estas consideraciones, esta Corte determina que la sentencia objeto de la presente acción extraordinaria de protección no se encuentra debidamente motivada de acuerdo al parametro de la **lógica**.

Finalmente, en lo que tiene que ver con la **comprensibilidad**, elemento que hace referencia al uso de un lenguaje claro por parte de los jueces, que garantice a las partes procesales y al conglomerado social, comprender el contenido de las decisiones judiciales, esta Corte Constitucional considera que en el caso en análisis, la sentencia impugnada es diáfana en su contenido y utiliza un lenguaje juridico adecuado que hace comprensible lo decidido por los jueces de la Sala Unica de la Corte Provincial de Justicia de Esmeraldas. Sin embargo, de ello, y conforme señalado en los párrafos precedentes, la motivación de la el caso *sub júdice*, no obedece a los requisitos de **razonabilidad** y **lógica**.

Por las razones expuestas, este Organismo determina que la sentencia impugnada no se encuentra debidamente motivada acorde a lo establecido en el articulo 76 numeral 7 literal I de la Constitución....

2. Fadeyeva v. Russia (European Court of Human Rights, First Section 2005)

PROCEDURE

1. The case originated in an application (no. 55723/00) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Russian national, Ms Nadezhda Mikhaylovna Fadeyeva (“the applicant”), on 11 December 1999.

3. The applicant alleged, in particular, that the operation of a steel plant in close proximity to her home endangered her health and well-being. She relied on Article 8 of the Convention.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Background

10. The applicant was born in 1949 and lives in the town of Cherepovets, an important steel-producing centre approximately 300 kilometres north-east of Moscow. In 1982 her family moved to a flat situated at 1 Zhukov Street, approximately 450 metres from the site of the Severstal steel plant (“the plant”). . . .

11. The plant was built during the Soviet era and was owned by the Ministry of Black Metallurgy of the Russian Soviet Federative Socialist Republic (RSFSR). The plant was, and remains, the largest iron smelter in Russia and the main employer for approximately 60,000 people. In order to delimit the areas in which the pollution caused by steel production might be excessive, the authorities established a buffer zone around the Severstal premises – “the sanitary security zone”. This zone was first delimited in 1965. It covered a 5,000-metre-wide area around the site of the plant. Although this zone was, in theory, supposed to separate the plant from the town's residential areas, in practice thousands of people (including the applicant's family) lived there. . . .

12. In 1990 the government of the RSFSR adopted a programme “On improving the environmental situation in Cherepovets”. The programme stated that “the concentration of toxic substances in the town's air exceed[ed] the acceptable norms many times” and that the morbidity rate of Cherepovets residents was higher than the average. It was noted that many people still lived within the steel plant's sanitary security zone. Under the programme, the steel plant was required to reduce its toxic emissions to safe levels by 1998. The programme listed a number of specific technological measures to attain this goal. The steel plant was also ordered to finance the construction of 20,000 square metres of residential property every year for the resettlement of people living within its sanitary security zone.

13. By Municipal Decree no. 30 of 18 November 1992, the boundaries of the sanitary security zone around the plant were redefined. The width of the zone was reduced to 1,000 metres.

14. In 1993 the steel plant was privatised and acquired by Severstal PLC. In the course of the privatisation the blocks of flats owned by the steel plant that were situated within the zone were transferred to the municipality.

15. On 3 October 1996 the government of the Russian Federation adopted Decree no. 1161 on the special federal programme "Improvement of the environmental situation and public health in Cherepovets" for the period from 1997 to 2010" The second paragraph of this programme stated:

"The concentration of certain polluting substances in the town's residential areas is twenty to fifty times higher than the maximum permissible limits (MPLs)[¹]...The biggest 'contributor' to atmospheric pollution is Severstal PLC, which is responsible for 96% of all emissions. The highest level of air pollution is registered in the residential districts immediately adjacent to Severstal's industrial site. The principal cause of the emission of toxic substances into the atmosphere is the operation of archaic and ecologically dangerous technologies and equipment in metallurgic and other industries, as well as the low efficiency of gas-cleaning systems. The situation is aggravated by an almost complete overlap of industrial and residential areas of the city, in the absence of their separation by sanitary security zones."

The decree further stated that "the environmental situation in the city ha[d] resulted in a continuing deterioration in public health". In particular, it stated that over the period from 1991 to 1995 the number of children with respiratory diseases increased from 345 to 945 cases per thousand, those with blood and haematogenic diseases from 3.4 to 11 cases per thousand, and those with skin diseases from 33.3 to 101.1 cases per thousand. The decree also noted that the high level of atmospheric pollution accounted for the increase in respiratory and blood diseases among the city's adult population and the increased number of deaths from cancer. .

..

B. The applicant's attempt to be resettled outside the zone

1. First set of court proceedings

20. In 1995 the applicant, with her family and various other residents of the block of flats where she lived, brought a court action seeking resettlement outside the zone. The applicant claimed that the concentration of toxic elements and the noise levels in the sanitary security zone exceeded the maximum permissible limits established by Russian legislation. The applicant alleged that the environmental

¹ MPLs are the safe levels of various polluting substances, as established by Russian legislation (предельно допустимые концентрации – ПДК).

situation in the zone was hazardous for humans, and that living there was potentially dangerous to health and life. . . .

21. On 17 April 1996 the Cherepovets City Court examined the applicant's action. . . . Referring to the ministerial decree of 1974, the court found that the authorities ought to have resettled all of the zone's residents but that they had failed to do so. In view of those findings, the court accepted the applicant's claim in principle, stating that she had the right in domestic law to be resettled. However, no specific order to resettle the applicant was given by the court in the operative part of its judgment. Instead, the court stated that the local authorities must place her on a "priority waiting list" to obtain new local authority housing. The court also stated that the applicant's resettlement was conditional on the availability of funds. . . .

24. The first-instance court issued an execution warrant and transmitted it to a bailiff. However, the decision remained unexecuted for a certain period of time. In a letter of 11 December 1996, the deputy mayor of Cherepovets explained that enforcement of the judgment was blocked, since there were no regulations establishing the procedure for the resettlement of residents outside the zone.

25. On 10 February 1997 the bailiff discontinued the enforcement proceedings on the ground that there was no "priority waiting list" for new housing for residents of the sanitary security zone.

2. *Second set of court proceedings*

26. In 1999 the applicant brought a fresh action against the municipality, seeking immediate execution of the judgment of 17 April 1996. The applicant claimed, inter alia, that systematic toxic emissions and noise from Severstal PLC's facilities violated her basic right to respect for her private life and home, as guaranteed by the Russian Constitution and the European Convention on Human Rights. She asked to be provided with a flat in an ecologically safe area or with the means to purchase a new flat.

27. On 27 August 1999 the municipality placed the applicant on the general waiting list for new housing. She was no. 6,820 on that list.

28. On 31 August 1999 the Cherepovets City Court dismissed the applicant's action. It noted that there was no "priority waiting list" for the resettlement of residents of sanitary security zones, and no council housing had been allocated for that purpose. It concluded that the applicant had been duly placed on the general waiting list. The court held that the judgment of 17 April 1996 had been executed and that there was no need to take any further measures. That judgment was upheld by the Vologda Regional Court on 17 November 1999.

C. Pollution levels at the applicant's place of residence

30. It appears that the basic data on air pollution, whether collected by the State monitoring posts or Severstal, are not publicly available. Both parties produced a number of official documents containing generalised information on industrial pollution in the town. The relevant parts of these documents are summarised in the following paragraphs and in the appendix to this judgment.

1. Information referred to by the applicant

31. The applicant claimed that the concentration of certain toxic substances in the air near her home constantly exceeded and continues to exceed the safe levels established by Russian legislation. Thus, in the period from 1990 to 1999 the average annual concentration of dust in the air in the Severstal plant's sanitary security zone was 1.6 to 1.9 times higher than the MPL, the concentration of carbon disulphide was 1.4 to 4 times higher and the concentration of formaldehyde was 2 to 4.7 times higher (data reported by the Cherepovets Centre for Sanitary Control). . . .

2. Information referred to by the respondent Government

36. In June 2004 the Government submitted a report entitled "The environmental situation in Cherepovets and its correlation with the activity of [Severstal PLC] during the period until 2004", prepared by the Cherepovets municipality.

37. According to the report, the environmental situation in Cherepovets has improved in recent years: thus, gross emissions of pollutants in the town were reduced from 370.5 thousand tonnes in 1999 to 346.7 thousand tonnes in 2003 (by 6.4%). Overall emissions from the Severstal PLC facilities were reduced during this period from 355.3 to 333.2 thousand tonnes (namely by 5.7%), and the proportion of unsatisfactory testing of atmospheric air at stationary posts fell from 32.7% to 26% in 2003.

38. The report further stated that, according to data received from four stationary posts of the State Agency for Hydrometeorology, a substantial decrease in the concentration of certain hazardous substances was recorded in the period from 1999 to 2003

39. According to the report, pollution in the vicinity of the applicant's home was not necessarily higher than in other districts of the town. . . .

D. Effects of pollution on the applicant

44. Since 1982 Ms Fadeyeva has been supervised by the clinic at Cherepovets Hospital no. 2. According to the Government, the applicant's medical history in this clinic does not link the deterioration in her health to adverse environmental conditions at her place of residence.

45. In 2001 a medical team from the clinic carried out regular medical check-ups on the staff at the applicant's place of work. As a result of these examinations,

the doctors detected indications of an occupational illness in five workers, including the applicant. In 2002 the diagnosis was confirmed: a medical report drawn up by the Hospital of the North-West Scientific Centre for Hygiene and Public Health in St Petersburg on 30 May 2002 stated that she suffered from various illnesses of the nervous system, namely occupational progressive/motor-sensory neuropathy of the upper extremities with paralysis of both middle nerves at the level of the wrist channel (primary diagnosis), osteochondrosis of the spinal vertebrae, deforming arthrosis of the knee joints, moderate myelin sheath degeneration, chronic gastroduodenitis, hypermetropia first grade (eyes) and presbyopia (associated diagnoses). Whilst the causes of these illnesses were not expressly indicated in the report, the doctors stated that they would be exacerbated by “working in conditions of vibration, toxic pollution and an unfavourable climate”.

46. In 2004 the applicant submitted a report entitled “Human health risk assessment of pollutant levels in the vicinity of the Severstal facility in Cherepovets”. This report, commissioned on behalf of the applicant, was prepared by Dr Mark Chernaik. Dr Chernaik concluded that he would expect the population residing within the zone to suffer from above-average incidences of odour annoyance, respiratory infections, irritation of the nose, coughs and headaches, thyroid abnormalities, cancer of the nose and respiratory tract, chronic irritation of the eyes, nose and throat, and adverse impacts on neurobehavioral, neurological, cardiovascular and reproductive functions. . . .

II. RELEVANT DOMESTIC LAW AND PRACTICE

C. Background to the Russian housing provisions

59. During the Soviet era, the majority of housing in Russia belonged to various public bodies or State-owned companies. The population lived in these dwellings as life-long tenants. In the 1990s extensive privatisation programmes were carried out. In certain cases, property that had not been privatised was transferred to local authorities.

60. To date, a certain part of the Russian population continues to live as tenants in local council houses on account of the related advantages. In particular, council house tenants are not required to pay property taxes, the amount of rent they pay is substantially lower than the market rate and they have full rights to use and control the property. Certain persons are entitled to claim new housing from the local authorities, provided that they satisfy the conditions established by law.

61. From a historical standpoint, the right to claim new housing was one of the basic socio-economic rights enshrined in Soviet legislation. Under the Housing Code of the RSFSR of 24 June 1983, which was still valid in Russia at the time of the relevant events, every tenant whose living conditions did not correspond to the required standards was eligible to be placed on a local authority waiting list in order to obtain new council housing. The waiting list establishes the priority order in which housing is attributed once it is available.

62. However, being on a waiting list does not entitle the person concerned to claim any specific conditions or time-frame from the State for obtaining new housing. Certain categories of persons, such as judges, policemen or handicapped persons are entitled to be placed on a special "priority waiting list". However, it appears that Russian legislation does not guarantee a right to be placed on this special list solely on the ground of serious ecological threats.

63. Since Soviet times, hundreds of thousands of Russians have been placed on waiting lists, which become longer each year on account of a lack of resources to build new council housing. At present, the fact of being on a waiting list represents an acceptance by the State of its intention to provide new housing when resources become available. The applicant submits, for example, that the person who is first on the waiting list in her municipality has been waiting for new council housing since 1968. She herself became no. 6,820 on that list in 1999.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

64. The applicant alleged that there had been a violation of Article 8 of the Convention on account of the State's failure to protect her private life and home from severe environmental nuisance arising from the industrial activities of the Severstal steel plant.

65. Article 8 of the Convention reads as follows:

"1. Everyone has the right to respect for his private and family life, his home, and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. Applicability of Article 8 in the present case

1. Nature and extent of the alleged interference with the applicant's rights

66. Both parties agreed that the applicant's place of residence was affected by industrial pollution. Neither was it disputed that the main cause of pollution was the Severstal steel plant, operating near the applicant's home.

67. The Court observes, however, that the degree of disturbance caused by Severstal and the effects of pollution on the applicant are disputed by the parties. Whereas the applicant insists that the pollution seriously affected her private life and

health, the respondent Government assert that the harm suffered by the applicant as a result of her home's location within the sanitary security zone was not such as to raise an issue under Article 8 of the Convention. In view of the Government's contention, the Court has first to establish whether the situation complained of by the applicant falls to be examined under Article 8 of the Convention.

(a) *General principles*

68. Article 8 has been relied on in various cases involving environmental concern, yet it is not violated every time that environmental deterioration occurs: no right to nature preservation is as such included among the rights and freedoms guaranteed by the Convention (see *Kyrtatos v. Greece*, no. 41666/98, § 52, ECHR 2003-VI). Thus, in order to raise an issue under Article 8 the interference must directly affect the applicant's home, family or private life.

69. The Court further points out that the adverse effects of environmental pollution must attain a certain minimum level if they are to fall within the scope of Article 8. The assessment of that minimum is relative and depends on all the circumstances of the case, such as the intensity and duration of the nuisance, and its physical or mental effects. The general context of the environment should also be taken into account. There would be no arguable claim under Article 8 if the detriment complained of was negligible in comparison to the environmental hazards inherent to life in every modern city.

70. Thus, in order to fall within the scope of Article 8, complaints relating to environmental nuisances have to show, firstly, that there was an actual interference with the applicant's private sphere, and, secondly, that a level of severity was attained.

(d) *The Court's assessment*

80. . . . [T]he Court observes that, in the applicant's submission, her health has deteriorated as a result of living near the steel plant. The only medical document produced by the applicant in support of this claim is a report drawn up by a clinic in St Petersburg (see paragraph 45 above). The Court finds that this report did not establish any causal link between environmental pollution and the applicant's illnesses. The applicant presented no other medical evidence which would clearly connect her state of health to high pollution levels at her place of residence.

81. The applicant also submitted a number of official documents confirming that, since 1995 (the date of her first recourse to the courts), environmental pollution at her place of residence has constantly exceeded safe levels (see paragraphs 31 et seq. above). According to the applicant, these documents proved that any person exposed to such pollution levels inevitably suffered serious damage to his or her health and well-being.

82. With regard to this allegation, the Court bears in mind, firstly, that the Convention came into force with respect to Russia on 5 May 1998. Therefore, only the period after this date can be taken into consideration in assessing the nature and extent of the alleged interference with the applicant's private sphere.

83. According to the materials submitted to the Court, since 1998 the pollution levels with respect to a number of rated parameters have exceeded the domestic norms. . . .

84. The Court observes further that the figures produced by the Government reflect only annual averages and do not disclose daily or maximum pollution levels. According to the Government's own submissions, the maximum concentrations of pollutants registered near the applicant's home were often ten times higher than the average annual concentrations (which were already above safe levels). The Court also notes that the Government have not explained why they failed to produce the documents and reports sought by the Court (see paragraph 43 above), although these documents were certainly available to the national authorities. Therefore, the Court concludes that the environmental situation could, at certain times, have been even worse than it appears from the available data.

85. The Court notes further that on many occasions the State recognised that the environmental situation in Cherepovets caused an increase in the morbidity rate for the city's residents (see paragraphs 12, 15, 34 and 47 above). The reports and official documents produced by the applicant, and, in particular, the report by Dr Mark Chernaik (see paragraph 46), described the adverse effects of pollution on all residents of Cherepovets, especially those who lived near the plant. Thus, according to the data provided by both parties, during the entire period under consideration the concentration of formaldehyde in the air near the applicant's home was three to six times higher than the safe levels. . . .

86. Finally, the Court pays special attention to the fact that the domestic courts in the present case recognised the applicant's right to be resettled. . . . Therefore, it can be said that the existence of interference with the applicant's private sphere was taken for granted at the domestic level.

87. In summary, the Court observes that over a significant period of time the concentration of various toxic elements in the air near the applicant's home seriously exceeded the MPLs. The Russian legislation defines MPLs as safe concentrations of toxic elements (see paragraph 49 above). Consequently, where the MPLs are exceeded, the pollution becomes potentially harmful to the health and well-being of those exposed to it. This is a presumption, which may not be true in a particular case. The same may be noted about the reports produced by the applicant: it is conceivable that, despite the excessive pollution and its proved negative effects on the population as a whole, the applicant did not suffer any special and extraordinary damage.

88. In the instant case, however, the very strong combination of indirect evidence and presumptions makes it possible to conclude that the applicant's health

deteriorated as a result of her prolonged exposure to the industrial emissions from the Severstal steel plant. Even assuming that the pollution did not cause any quantifiable harm to her health, it inevitably made the applicant more vulnerable to various illnesses. Moreover, there can be no doubt that it adversely affected her quality of life at home. Therefore, the Court accepts that the actual detriment to the applicant's health and well-being reached a level sufficient to bring it within the scope of Article 8 of the Convention.

2. Attribution of the alleged interference to the State

89. The Court notes that, at the material time, the Severstal steel plant was not owned, controlled, or operated by the State. Consequently, the Court considers that the Russian Federation cannot be said to have directly interfered with the applicant's private life or home. At the same time, the Court points out that the State's responsibility in environmental cases may arise from a failure to regulate private industry. Accordingly, the applicant's complaints fall to be analysed in terms of a positive duty on the State to take reasonable and appropriate measures to secure the applicant's rights under Article 8 § 1 of the Convention. In these circumstances, the Court's first task is to assess whether the State could reasonably be expected to act so as to prevent or put an end to the alleged infringement of the applicant's rights.

90. The Court observes in this respect that the Severstal steel plant was built by and initially belonged to the State. The plant malfunctioned from the start, releasing gas fumes and odours, contaminating the area, and causing health problems and nuisance to many people in Cherepovets. Following the plant's privatisation in 1993, the State continued to exercise control over the plant's industrial activities by imposing certain operating conditions on the plant's owner and supervising their implementation. . . . [T]he municipal authorities were aware of the continuing environmental problems and applied certain sanctions in order to improve the situation.

91. The Court further observes that the Severstal steel plant was and remains responsible for almost 95% of overall air pollution in the city. In contrast to many other cities, where pollution can be attributed to a large number of minor sources, the main cause of pollution in Cherepovets was easily definable. The environmental nuisances complained of were very specific and fully attributable to the industrial activities of one particular undertaking. This is particularly true with respect to the situation of those living in close proximity to the Severstal steel plant.

92. The Court concludes that the authorities in the present case were certainly in a position to evaluate the pollution hazards and to take adequate measures to prevent or reduce them. The combination of these factors shows a sufficient nexus between the pollutant emissions and the State to raise an issue of the State's positive obligation under Article 8 of the Convention.

93. It remains to be determined whether the State, in securing the applicant's rights, has struck a fair balance between the competing interests of the applicant and the community as a whole, as required by paragraph 2 of Article 8.

B. Justification under Article 8 § 2

1. General principles

94. The Court reiterates that whatever analytical approach is adopted – the breach of a positive duty or direct interference by the State – the applicable principles regarding justification under Article 8 § 2 as to the balance between the rights of an individual and the interests of the community as a whole are broadly similar.

95. Direct interference by the State with the exercise of Article 8 rights will not be compatible with paragraph 2 unless it is “in accordance with the law”. The breach of domestic law in these cases would necessarily lead to a finding of a violation of the Convention.

96. However, where the State is required to take positive measures, the choice of means is in principle a matter that falls within the Contracting State's margin of appreciation. There are different avenues to ensure “respect for private life”, and even if the State has failed to apply one particular measure provided by domestic law, it may still fulfil its positive duty by other means. Therefore, in those cases the criterion “in accordance with the law” of the justification test cannot be applied in the same way as in cases of direct interference by the State.

98. . . . [I]n cases where an applicant complains about the State's failure to protect his or her Convention rights, domestic legality should be approached not as a separate and conclusive test, but rather as one of many aspects which should be taken into account in assessing whether the State has struck a “fair balance” in accordance with Article 8 § 2.

2. Legitimate aim

99. Where the State is required to take positive measures in order to strike a fair balance between the interests of an individual and the community as a whole, the aims mentioned in the second paragraph of Article 8 may be of a certain relevance, although this provision refers only to “interferences” with the right protected by the first paragraph – in other words, it is concerned with the negative obligations flowing therefrom.

100. The Court observes that the essential justification offered by the Government for the refusal to resettle the applicant was the protection of the interests of other residents of Cherepovets who were entitled to free housing under the domestic legislation. In the Government's submissions, since the municipality had only limited resources to build new housing for social purposes, the applicant's

immediate resettlement would inevitably breach the rights of others on the waiting list.

101. Further, the Government referred, at least in substance, to the economic well-being of the country (see paragraph 111 below). Like the Government, the Court considers that the continuing operation of the steel plant in question contributed to the economic system of the Vologda region and, to that extent, served a legitimate aim within the meaning of paragraph 2 of Article 8 of the Convention. It remains to be determined whether, in pursuing this aim, the authorities have struck a fair balance between the interests of the applicant and those of the community as a whole.

3. *"Necessary in a democratic society"*

(a) *General principles*

105. It remains open to the Court to conclude that there has been a manifest error of appreciation by the national authorities in striking a fair balance between the competing interests of different private actors in this sphere. However, the complexity of the issues involved with regard to environmental protection renders the Court's role primarily a subsidiary one. The Court must first examine whether the decision-making process was fair and such as to afford due respect to the interests safeguarded to the individual by Article 8, and only in exceptional circumstances may it go beyond this line and revise the material conclusions of the domestic authorities.

(d) *The Court's assessment*

(i) *The alleged failure to resettle the applicant*

116. The Court notes at the outset that the environmental consequences of the Severstal steel plant's operation are not compatible with the environmental and health standards established in the relevant Russian legislation. In order to ensure that a large undertaking of this type remains in operation, Russian legislation, as a compromise solution, has provided for the creation of a buffer zone around the undertaking's premises in which pollution may officially exceed safe levels. Therefore, the existence of such a zone is a condition *sine qua non* for the operation of an environmentally hazardous undertaking – otherwise it must be closed down or significantly restructured.

117. . . . [I]t would only be possible for the Severstal plant to operate in conformity with the domestic environmental standards if this zone, separating the undertaking from the residential areas of the town, continued to exist and served its purpose.

119. The Government further submitted that the pollution levels attributable to the metallurgic industry were the same if not higher in other districts of Cherepovets than those registered near the applicant's home (see paragraph 39

above). However, this proves only that the Severstal steel plant has failed to comply with domestic environmental norms and suggests that a wider sanitary security zone should perhaps have been required. In any event, this argument does not affect the Court's conclusion that the applicant lived in a special zone where the industrial pollution exceeded safe levels and where any housing was in principle prohibited by the domestic legislation.

120. It is material that the applicant moved to this location in 1982 knowing that the environmental situation in the area was very unfavourable. However, given the shortage of housing at that time and the fact that almost all residential buildings in industrial towns belonged to the State, it is very probable that the applicant had no choice other than to accept the flat offered to her family. Moreover, due to the relative scarcity of environmental information at that time, the applicant may have underestimated the seriousness of the pollution problem in her neighbourhood. It is also important that the applicant obtained the flat lawfully from the State, which could not have been unaware that the flat was situated within the steel plant's sanitary security zone and that the ecological situation was very poor. Therefore, it cannot be claimed that the applicant herself created the situation complained of or was somehow responsible for it.

121. It is also relevant that it became possible in the 1990s to rent or buy residential property without restrictions, and the applicant has not been prevented from moving away from the dangerous area. In this respect the Court observes that the applicant was renting the flat at 1 Zhukov Street from the local council as a life-long tenant. The conditions of her rent were much more favourable than those she would find on the free market. Relocation to another home would imply considerable financial outlay which, in her situation, would be almost unfeasible, her only income being a State pension plus payments related to her occupational disease. The same may be noted regarding the possibility of buying another flat, mentioned by the respondent Government. Although it is theoretically possible for the applicant to change her personal situation, in practice this would appear to be very difficult. Accordingly, this point does not deprive the applicant of the status required in order to claim to be a victim of a violation of the Convention within the meaning of Article 34, although it may, to a certain extent, affect the scope of the Government's positive obligations in the present case.

122. The Court observes that Russian legislation directly prohibits the building of any residential property within a sanitary security zone. However, the law does not clearly indicate what should be done with those persons who already live within such a zone. The applicant insisted that the Russian legislation required immediate resettlement of the residents of such zones and that resettlement should be carried out at the expense of the polluting undertaking. However, the national courts interpreted the law differently. The Cherepovets City Court's decisions of 1996 and 1999 established that the polluting undertaking is not responsible for resettlement; the legislation provides only for placing the residents of the zone on the general waiting list. The same court dismissed the applicant's claim for reimbursement of the cost of resettlement. In the absence of any direct requirement of immediate resettlement, the Court does not find this reading of the law absolutely

unreasonable. Against the above background, the Court is ready to accept that the only solution proposed by the national law in this situation was to place the applicant on a waiting list. Thus, the Russian legislation as applied by the domestic courts and national authorities makes no difference between those persons who are entitled to new housing, free of charge, on a welfare basis (war veterans, large families, etc.) and those whose everyday life is seriously disrupted by toxic fumes from a neighbouring plant.

123. The Court further notes that, since 1999, when the applicant was placed on the waiting list, her situation has not changed. Moreover, as the applicant rightly pointed out, there is no hope that this measure will result in her resettlement from the zone in the foreseeable future. The resettlement of certain families from the zone by Severstal PLC is a matter of the plant's good faith, and cannot be relied upon. Therefore, the measure applied by the domestic courts makes no difference to the applicant: it does not give her any realistic hope of being removed from the source of pollution.

(ii) The alleged failure to regulate private industry

124. Recourse to the measures sought by the applicant before the domestic courts (urgent resettlement or reimbursement of the resettlement costs) is not necessarily the only remedy to the situation complained of. The Court points out that “the choice of the means calculated to secure compliance with Article 8 in the sphere of the relations of individuals between themselves is in principle a matter that falls within the Contracting States' margin of appreciation. In this connection, there are different ways of ensuring 'respect for private life', and the nature of the States obligation will depend on the particular aspect of private life that is at issue” (see *X and Y v. the Netherlands*, judgment of 26 March 1985, Series A no. 91, p. 12, § 24). In the present case the State had at its disposal a number of other tools capable of preventing or minimising pollution, and the Court may examine whether, in adopting measures of a general character, the State complied with its positive duties under the Convention.

125. In this respect the Court notes that, according to the Government's submissions, the environmental pollution caused by the steel plant has been significantly reduced over the past twenty years. . . .

126. At the same time, the Court observes that the implementation of the 1990 and 1996 federal programmes did not achieve the expected results: in 2003 the concentration of a number of toxic substances in the air near the plant still exceeded safe levels. . . .

131. The Court considers that it is not possible to make a sensible analysis of the Government's policy vis-à-vis Severstal because they have failed to show clearly what this policy consisted of. In these circumstances, the Court has to draw an adverse inference. In view of the materials before it, the Court cannot conclude that,

in regulating the steel plant's industrial activities, the authorities gave due weight to the interests of the community living in close proximity to its premises.

132. In sum, the Court finds the following. The State authorised the operation of a polluting plant in the middle of a densely populated town. Since the toxic emissions from this plant exceeded the safe limits established by the domestic legislation and might endanger the health of those living nearby, the State established through legislation that a certain area around the plant should be free of any dwelling. However, these legislative measures were not implemented in practice.

133. It would be going too far to assert that the State or the polluting undertaking were under an obligation to provide the applicant with free housing and, in any event, it is not the Court's role to dictate precise measures which should be adopted by the States in order to comply with their positive duties under Article 8 of the Convention. In the present case, however, although the situation around the plant called for a special treatment of those living within the zone, the State did not offer the applicant any effective solution to help her move away from the dangerous area. Furthermore, although the polluting plant in issue operated in breach of domestic environmental standards, there is no indication that the State designed or applied effective measures which would take into account the interests of the local population, affected by the pollution, and which would be capable of reducing the industrial pollution to acceptable levels.

134. The Court concludes that, despite the wide margin of appreciation left to the respondent State, it has failed to strike a fair balance between the interests of the community and the applicant's effective enjoyment of her right to respect for her home and her private life. There has accordingly been a violation of Article 8 of the Convention. . . .

FOR THESE REASONS, THE COURT, UNANIMOUSLY

1. Holds that there has been a violation of Article 8 of the Convention;

2. Holds

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 6,000 (six thousand euros) in respect of non-pecuniary damage, to be converted into Russian roubles at the rate applicable at the date of settlement, plus any tax that may be chargeable on that amount;

(b) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts:

(i) EUR 6,500 (six thousand five hundred euros) in respect of costs and expenses incurred by her Russian lawyers and their fees, to be converted into Russian roubles at the rate applicable at the date of settlement, less EUR 1,732 (one thousand seven hundred and thirty-two euros), already paid to Mr Koroteyev in legal aid;

- (ii) GBP 5,540 (five thousand five hundred and forty pounds sterling) in respect of costs and expenses incurred by her British lawyers and advisers and their fees;
- (iii) any tax that may be chargeable on the above amounts;
- (c) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points

3. M.C. Mehta v. Union of India & Others (India 2004)

Supreme Court of India

(Available at <http://indiankanoon.org/doc/69408974/>)

BENCH: Y.K. Sabharwal & H.K. Sema.

The main question to be examined in these matters is whether the mining activity in area up to 5 kilometers from the Delhi-Haryana border on the Haryana side of the ridge and also in the Aravalli hills causes environment degradation and what directions are required to be issued. The background in which the question has come up for consideration may first be noticed.

The Haryana Pollution Control Board (HPCB) was directed by orders of this Court dated 20th November, 1995 to inspect and ascertain the impact of mining operation on the Badkal Lake and Surajkund - ecologically sensitive area falling within the State of Haryana. In the report that was submitted, it was stated that explosives are being used for rock blasting for the purpose of mining; unscientific mining operation was resulting in lying of overburden materials (topsoil and murum remain) haphazardly; and deep mining for extracting silica sand lumps is causing ecological disaster as these mines lie unreclaimed and abandoned. It was, inter alia, recommended that the Environmental Management Plan (EMP) should be prepared by mine lease holders for their mines and actual mining operation made operative after obtaining approval from the State Departments of Environment or HPCB; the EMP should be implemented following a time bound action plan; land reclamation and afforestation programmes shall also be included in the EMP and must be implemented strictly by the implementing authorities. The report recommended stoppage of mining activities within a radius of 5 kms. from Badkal Lake and Surajkund (tourist place). The Haryana Government, on the basis of the recommendations made in the report, stopped mining operations within the radius of 5 kms of Badkal Lake and Surajkund. The mine operators raised objections to the recommendations of stoppage of mining operations. According to them, pollution, if any, that was generated by the mining activities cannot go beyond a distance of 1 km. and the stoppage was wholly unjustified.

NEERI Report and earlier directions

By order dated April 12, 1996, the Court sought the expert opinion of National Environmental Engineering Research Institute (NEERI) on the point whether the mining operations in the said area are to be stopped in the interest of environmental protection, pollution control and tourism development and, if so, whether the limit should be 5 kms. or less. . . .

On consideration of the reports, this Court came to the conclusion that the mining activities in the vicinity of tourist resorts are bound to cast serious impact on the local ecology. The mining brings extensive alteration in the natural land profile of the area. Mined pits and unattended dumps of overburdened left behind during the mining operations are the irreversible consequences of the mining operations and rock blasting, movement of heavy vehicles, movements and operations of mining

equipment and machinery cause considerable pollution in the shape of noise and vibration. The ambient air in the mining area gets highly polluted by the dust generated by the blasting operations, vehicular movement, loading/unloading/transportation and the exhaust gases from equipment and machinery used in the mining operations. It was directed that in order to preserve environment and control pollution within the vicinity of two tourist resorts, it is necessary to stop mining activity within 2 kms. radius of the tourist resorts of Badkal Lake and Surajkund. . . . Further, it was directed that failing to comply with the recommendations may result in the closure of the mining operations and that the mining leases within the area from 2 kms. to 5 kms. radius shall not be renewed without obtaining prior no objection certificate from the HPCB as also from the Central Pollution Control Board (CPCB). Unless both the Boards grant no objection certificate, the mining leases in the said area shall not be renewed. (M.C. Mehta v. Union of India & Ors. [(1996) 8 SCC 462]).

Present Issues

The aspects to be examined include the compliance of the conditions imposed by the Pollution Boards while granting no objection certificate for mining and also compliance of various statutory provisions and notifications as also obtaining of the requisite clearances and permissions from the concerned authorities before starting the mining operations.

In matters under consideration, the areas of mining fall within the districts of Faridabad and Gurgaon in the Haryana State. I.A. No.1785/01 has been filed by the Delhi Ridge Management Board praying that the Government of Haryana be directed to stop all mining activities and pumping of ground water in and from area up to 5 kms from Delhi-Haryana border in the Haryana side of the Ridge, inter alia, stating that in the larger interest of maintaining the ecological balance of the environment and protecting the Asola Bhatti Wildlife Sanctuary and the ridge located in Delhi and adjoining Haryana, it is necessary to stop mining. In the application, it has been averred that the Asola Bhatti Wildlife Sanctuary is located on the southern ridge which is one of the oldest mountain ranges of the world and represents the biogeographical outer layer of the Aravalli mountain range which is one of the most protected areas in the country. The sanctuary is significant as it is instrumental in protecting the green lung of National Capital of Delhi and acts as a carbon sink for the industrial and vehicular emissions of the country's capital which is witnessing rapid growth in its pollution level each year. The ridge, it is averred, is a potential shelter belt against advancing desertification and has been notified a wildlife sanctuary and reserve forest by the Government of National Capital Territory of Delhi. Regarding the mining activities, it is averred that for extraction of Badarpur (Silica sand), there is large scale mining activity on the Haryana side just adjacent to the wildlife sanctuary of the ridge which activities threaten the sanctuaries habitat and also pumping of large quantity of ground water from mining pits. It was also stated that the ground water level was being depleted as a result of the mining activity. Further, the query dust that comes out of mining pits is a serious health hazard for human population living nearby and also the wild animals inhabiting the sanctuary pointing out that the mining and extraction of ground water had been

banned in National Capital Territory of Delhi and the ridge being protected as per the order of this Court, it is necessary, that the ridge on the Haryana side is also protected - that being the extension of the range and, therefore, mining, withdrawal of ground water and destruction of flora, etc. should also be restricted outside Delhi or at least upto 5 kms. from Delhi-Haryana border towards Haryana. On 6th May, 2002, this Court directed the Chief Secretary, Government of Haryana to stop, within 48 hours, all mining activities and pumping of ground water in and from an area up to 5kms. from Delhi- Haryana border in the Haryana side of the ridge and also in the Aravalli Hills. The question to be considered is whether the order shall be made absolute or vacated or modified.

Our examination of the issues is confined to the effect on ecology of the mining activity carried on within an area of 5 Kms. of Delhi-Haryana Border on Haryana side in areas falling within the district of Faridabad and Gurgaon and in Aravalli Hills within Gurgaon District. The question is whether the mining activity deserves to be absolutely banned or permitted on compliance of stringent conditions and by monitoring it to prevent the environmental pollution.

EPCA Visits

In terms of the order passed by this Court on 22nd July, 2002, Environmental Pollution Central Authority (EPCA) was directed to give a report with regard to environment in the area preferably after a personal visit to the area in question without any advance notice. . . .

During the visit, prima facie, EPCA found evidence of clear violation of some of the key conditions of order of this court dated May 10, 1996. . . .

The most serious violation noticed by the EPCA was the continuation of mining even after reaching the ground water level which has been disallowed by the regulatory agencies. . . . [The Court describes evidence of many other violations.]

From the above, it is clear that little or nothing has been done to seriously comply with the directives of the Hon'ble Supreme Court as well as to enforce the regulations and conditions laid down by the authorities for environmental management of the mining areas. . . .

The NOC given by the Central Pollution Control Board, includes an explicit condition regarding ground water:

That the mine owner will ensure that there is no discharge of effluent of ground water outside lease premises. They must take measures for rain water harvesting and reuse of water so as not to affect the groundwater table in the areas. Most importantly, it stipulates that no mining operations shall be carried out in the water table area.

This condition has been grossly violated. Even the Haryana government's affidavit in court accepts that pumping of ground water is taking place, though it

attempts to soften the issue by arguing that it is only being done in a few cases. Under this condition, mining is not allowed in the water table area. EPCA saw deep and extensive pits of mines with vast water bodies. EPCA also saw evidence of pumps and pipes being used to drain out the ground water so that mining could continue. Therefore, the miners are mining for silica, but also in the process, mining and destroying the ground water reserves of the areas. In times of such water stress and desperation, this water mining is nothing less than a gross act of wastage of a key resource. This time the stress has been further aggravated by the failure of monsoon. Notices have been issued in the nearby housing colonies stating that fall in groundwater table due to lack of rains is responsible for water shortage in the area this season. This only indicates how important it is to conserve ground water in the region for long term sustainability of drinking water sources. Ground water is the only source of drinking water here.

On the basis of study and visit as well as the report of the Central Ground Water Board, EPCA made the following recommendations:

"1. The ban on the mining activities and pumping of ground water in and from an area up to 5 kms. from the Delhi-Haryana border in the Haryana side of the ridge and also in the Aravalli Hill must be maintained.

2. Not only must further degradation be halted but, all efforts must be made to ensure that the local economy is rejuvenated, with the use of plantations and local water harvesting based opportunities. It is indeed sad to note the plight of people living in these hills who are caught between losing their water dependent livelihood and between losing their only desperate livelihood to break stones in the quarries. It is essential that the Government of Haryana seriously implements programmes to enhance the land based livelihood of people . . . Local people must not be thrown into making false choices, which may secure their present but will destroy their future. Already, all the villages visited by EPCA complained of dire and desperate shortages of drinking water. Women talked about long queues before taps to collect water. . . .

7. EPCA would also recommend that the mining area outside the 5 kms. area must be demarcated and regulated. In this context, EPCA would like to draw the attention of the court to the violations and gross disregard for regulations found in the present mines. It is not out of place to mention that these mines are owned by very powerful and highly placed individuals in the establishment. . . .

The EPCA, while reaffirming the recommendations that had been made in its earlier report dated 9th August, 2002, made the following recommendations :

"The overall assessment of the environmental impact of the mining activities in the area especially its implication for ground water level in the region reaffirms EPCA's assessment presented in its earlier report. EPCA

upholds its earlier recommendations made vide the report submitted to the Hon'ble Supreme Court on August 9, 2002.

EPCA is concerned that if mining is allowed to continue in this area, it will have serious implications for the groundwater reserve which is the only source of drinking water in the area. . . . Unless immediate measures are taken to conserve and augment water resources in the area acute survival crisis is expected. Interviews with local villagers in the vicinity of mines confirm that water shortage is already a serious problem in the region. The extent of degradation in and around mines is the evidence of failure to enforce basic rules for ecological safeguards. . . ."

Submissions for Confirming or Varying Order dated 6th May, 2002

Having regard to the ground realities as reflected in the aforesaid reports, should the order passed on 6th May, 2002 be varied is the question? The continuance of the order has been strenuously objected to by the mining lease holders and also by the Government of Haryana. . . . We have also heard Mr. Raju Ramachandran and Mr. Altaf Ahmad, learned Additional Solicitor Generals for the Ministry of Environment and Forest, Government of India, Mr. C.S. Vaidyanathan and Mr. Kaushik (in support of IA No.1825/2002 filed by the villagers). Mr. Ranjit Kumar, learned Amicus and Mr. M.C. Mehta, Advocate/petitioner-in- person and Mr. Kailash Vasudeva for Government of Delhi have made submissions in support of closure of mining activity and for making the order dated 6th May, 2002 absolute by prohibiting all mining activities and pumping of ground water in and from an area upto 5 kms. from Delhi- Haryana Border in the Haryana side of the Ridge and also in the Aravalli Hills.

Notifications Regarding Mining on Aravalli Hills

The notification dated 7th May, 1992 issued by the Ministry of Environment and Forest, Government of India under Section 3(2)(v) of the EP Act read with Rule 5 of the Rules made under the said Act has considerable bearing on the aspect of mining in Aravalli Hills. The notification, inter alia, bans all new mining operations including renewals of mining leases and sets out the procedure for taking prior permission before undertaking such an activity. . . .

The powers vested in the Central Government in terms of the aforesaid notification dated 7th May, 1992 were delegated to the State Governments concerned, namely, Rajasthan and Haryana by issue of notification dated November 29, 1999 by the Central Government, Ministry of Environment and Forest. . . . The Central Government, in terms of notification dated 28th February, 2003, has withdrawn the delegation in favour of State Governments. . . . [Statutory requirements for environmental impact assessments were not met.]

Legal Parameters

The natural sources of air, water and soil cannot be utilized if the utilization results in irreversible damage to environments. There has been accelerated degradation of environment primarily on account of lack of effective enforcement of environmental laws and non-compliance of the statutory norms. This Court has repeatedly said that the right to live is a fundamental right under Article 21 of the Constitution and it includes the right to of enjoyment of pollution-free water and air for full enjoyment of life. (See *Subhash Kumar v. State of Bihar* [AIR 1991 SC 420]. Further, by 42nd Constitutional Amendment, Article 48-A was inserted in the Constitution in Part IV stipulating that the State shall endeavour to protect and improve the environment and to safeguard the forest and wildlife of the country. Article 51A, inter alia, provides that it shall be the duty of every citizen of India to protect and improve the natural environment including forest, lakes, rivers and wildlife and to have compassion for living creatures. Article 47 which provides that it shall be the duty of the State to raise the level of nutrition and the standard of living and to improve public health is also relevant in this connection. The most vital necessities, namely, air, water and soil, having regard to right of life under Article 21 cannot be permitted to be misused and polluted so as to reduce the quality of life of others. Having regard to the right of the community at large it is permissible to encourage the participation of Amicus Curiae, the appointment of experts and the appointments of monitory committees. The approach of the Court has to be liberal towards ensuring social justice and protection of human rights. In *M.C. Mehta v. Union of India* [(1987) 4 SCC 463], this Court held that life, public health and ecology has priority over unemployment and loss of revenue. The definition of 'sustainable development' which Brundtland gave more than 3 decades back still holds good. The phrase covers the development that meets the needs of the present without compromising the ability of the future generation to meet their own needs. In *Narmada Bachao Andolan v. Union of India & Ors.* [(2000) 10 SCC 664], this Court observed that sustainable development means the type or extent of development that can take place and which can be sustained by nature/ecology with or without mitigation. In these matters, the required standard now is that the risk of harm to the environment or to human health is to be decided in public interest, according to a "reasonable person's " test.

The mining operation is hazardous in nature. It impairs ecology and people's right of natural resources. The entire process of setting up and functioning of mining operation require utmost good faith and honesty on the part of the intending entrepreneur. For carrying on any mining activity close to township which has tendency to degrade environment and are likely to affect air, water and soil and impair the quality of life of inhabitants of the area, there would be greater responsibility on the part of the entrepreneur. The fullest disclosures including the potential for increased burdens on the environment consequent upon possible increase in the quantum and degree of pollution, has to be made at the outset so that public and all those concerned including authorities may decide whether the permission can at all be granted for carrying on mining activity. The regulatory authorities have to act with utmost care in ensuring compliance of safeguards, norms and standards to be observed by such entrepreneurs. When questioned, the regulatory authorities have to show that the said authorities acted in the manner

enjoined upon them. Where the regulatory authorities, either connive or act negligently by not taking prompt action to prevent, avoid or control the damage to environment, natural resources and peoples' life, health and property, the principles of accountability for restoration and compensation have to be applied. The development and the protection of environments are not enemies. If without degrading the environment or minimising adverse effects thereupon by applying stringent safeguards, it is possible to carry on development activity applying the principles of sustainable development, in that eventuality, the development has to go on because one cannot lose sight of the need for development of industries, irrigation resources and power projects etc. including the need to improve employment opportunities and the generation of revenue. A balance has to be struck. We may note that to stall fast the depletion of forest, series of orders have been passed by this Court in T.N. Godavarman's case regulating the felling of trees in all the forests in the country. Principle 15 of Rio Conference of 1992 relating to the applicability of precautionary principle which stipulates that where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for proposing effective measures to prevent environmental degradation is also required to be kept in view. In such matters, many a times, the option to be adopted is not very easy or in a straight jacket. If an activity is allowed to go ahead, there may be irreparable damage to the environment and if it is stopped, there may be irreparable damage to economic interest. In case of doubt, however, protection of environment would have precedence over the economic interest. Precautionary principle requires anticipatory action to be taken to prevent harm. The harm can be prevented even on a reasonable suspicion. It is not always necessary that there should be direct evidence of harm to the environment. Bearing in mind the aforesaid principles, we have to consider the main question: should the mining activity in areas in question be banned altogether or permitted and, if so, conditions to be provided therefor? The reports and suggestions of NEERI, EPCA and CEC have already been extensively noted. The effect of mining activity in area up to 5 km. from Delhi-Haryana border on Haryana side of the ridge and also in the Aravalli Hills is to be seen in light of these reports and another report dealt later. One of the aspect stated in these reports is about carrying on of mining activity in close proximity to the residential area and/or main roads carrying traffic. . . .

Modification of Order dated 6th May, 2002 Regarding Mining in Aravalli

Now, the question is should mining activities in the Aravalli range in Gurgaon district be permitted to restart and, to that extent, the order dated 6th May, 2002 be modified, meanwhile directing implementation of recommendations in the report of CMPDI and earlier referred reports. The other option is to first constitute a monitoring committee directing it to individually examine and inspect mines from environmental angle in the light of the said recommendations and file a report in this Court in respect of individual mines with its recommendations for restart or otherwise as also recommendation, if any, for the payment by the mine operators and/or by State Government towards environmental fund having regard to the precautionary principles and polluter pays principle and on consideration of that report, to decide the aspect of modification of the order dated 6th May, 2002, partially or entirely. We are of the view that the second option is more appropriate.

We are conscious of observations in CMPDI that measures for protecting the environment can be undertaken without stopping mine operations and also the suggestions of MOEF to permit mining subject to the mine lease holders undertaking to comply with such conditions which remain to be complied, but, having regard to the enormous degradation of the environment, in our view, the safer and the proper course is to first constitute a Monitoring Committee, get a report from it and only thereafter consider, on individual mine to mine basis, lifting of ban imposed in terms of order dated 6th May, 2002. Before concluding this aspect, we may note that assuming there was any ambiguity about the applicability of order dated 6th May, 2002 to mining in Aravalli Range, it is clarified that the said order would be applicable to all the mines in Aravalli hill range in Gurgaon district. . . .

We have already extracted the recommendations of NEERI, as also violations noticed in the reports submitted by EPCA and the suggestions of EPCA, CEC and CMPDI. The Monitoring Committee shall inspect the leases in question in Faridabad District as well in the light of these recommendations and file its report containing suggestions on recommencement or otherwise of the mining activity therein. It may be reiterated that if, despite stringent conditions, the degradation of environment continues and reaches a stage of no return, this Court may have to consider, at a later date, the closure of mining activity in areas where there is such a risk. As earlier noticed as well, it would not be expedient to lift the ban on mining imposed in terms of the order of this Court dated 6th May, 2002 before ensuring implementation of suggestions of CMPDI and other recommendations of experts (NEERI, EPCA and CEC). The safer course is to consider this question, on individual basis after receipt of report of the Monitoring Committee.

Conclusions

1. The order dated 6th May, 2002 as clarified hereinbefore cannot be vacated or varied before consideration of the report of the Monitoring Committee constituted by this judgment.

2. The notification of environment assessment clearance dated 27th January, 1994 is applicable also when renewal of mining lease is considered after issue of the notification.

3. On the facts of the case, the mining activity on areas covered under Section 4 and/or 5 of Punjab Land Preservation Act, 1900 cannot be undertaken without approval under the Forest (Conservation) Act, 1980.

4. No mining activity can be carried out on area over which plantation has been undertaken under Aravalli project by utilization of foreign funds.

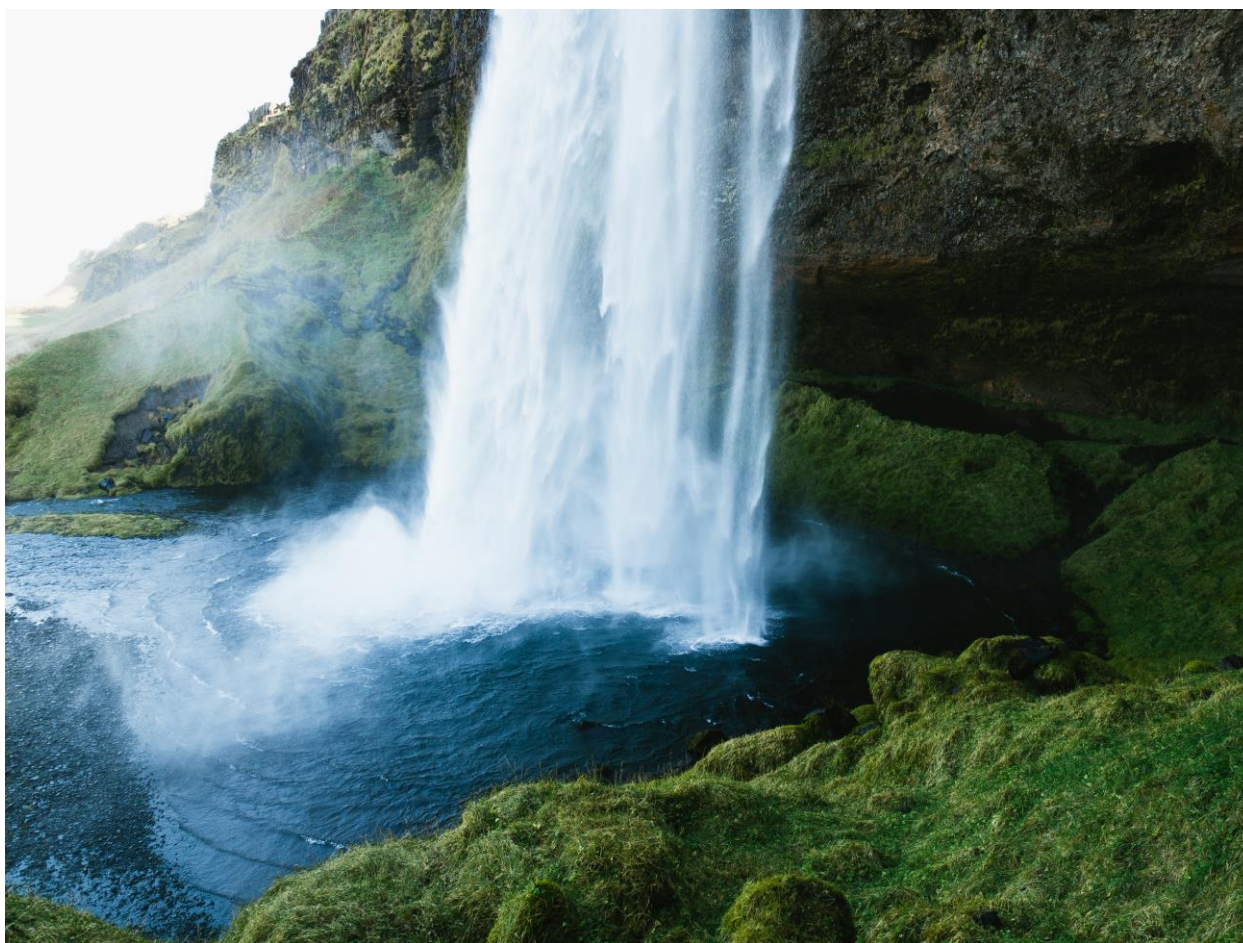
5. The mining activity can be permitted only on the basis of sustainable development and on compliance of stringent conditions.

6. The Aravalli hill range has to be protected at any cost. In case despite stringent condition, there is an adverse irreversible effect on the ecology in the

Aravalli hill range area, at a later date, the total stoppage of mining activity in the area may have to be considered. For similar reasons such step may have to be considered in respect of mining in Faridabad District as well.

7. MOEF is directed to prepare a short term and long term action plan for the restoration of environmental quality of Aravalli hills in Gurgaon district having regard to what is stated in final report of CMPDI within four months.

8. Violation of any of the conditions would entail the risk of cancellation of mining lease. The mining activity shall continue only on strict compliance of the stipulated conditions. The matters are directed to be listed after reopening of courts after summer vacation on receipt of the report from the Monitoring Committee.



CHAPTER 5: REMEDIES

[The Constitution lays an] obligation on this Court to protect the fundamental rights of the people and for that purpose this Court has all incidental and ancillary powers including the power to forge new remedies and fashion new strategies designed to enforce the fundamental rights. It is in realization of this constitutional obligation that this Court has in the past innovated new methods and strategies for the purpose of securing enforcement of the fundamental rights, particularly in the case of the poor and the disadvantaged who are denied their basic human rights and to whom freedom and liberty have no meaning.

Indian Supreme Court, *Shriram Foods Case* (1987)

Environmental cases are among constitutional law's most complicated to remedy because the injuries, as we have seen, can be multi-faceted with many interdependent and often moving parts, and with both short- and long-term

consequences for the environment and for the humans who live, or will live, in it. And most courts are keenly aware of the limitations of their own power—of the fact—namely, that courts have no particular resource other than their own legitimacy to ensure respect for or compliance with judicial orders. And yet, courts have chosen to engage because they realize that, through coordination with other parts of government and in dialogue with both the public and private sectors, they can play a pivotal role in securing environmental rights.

This Chapter surveys the types of remedies courts have developed in the environmental cases where they have found liability for violation of constitutional rights. Despite the challenges, courts have been extraordinarily creative in designing remedies that are ambitious enough to be effective in remedying the environmental damage, yet defined and limited enough that defendants can implement them. Still, defendants—both official and private—can be recalcitrant, and we consider in the second part of the chapter the challenges that courts face in enforcing the remedies they have ordered.

A. State Obligations under the International Law Framework.

Internationally accepted ideas of the various obligations engendered by human rights indicate that all rights—both civil and political rights and social and economic—generate at least four levels of duties for a state that undertakes to adhere to a rights regime, namely the duty to respect, protect, promote, and fulfill these rights. This approach has been incorporated into many countries' environmental constitutionalism. The Philippine Court, for instance, has made clear that the State owes different levels of obligation: "a balanced and healthful ecology and to health are mandated as state policies by the Constitution itself, thereby highlighting their continuing importance and imposing upon the state a solemn obligation to preserve the first and protect and advance the second" The Dutch Constitution uses mandatory language. It states that "[i]t shall be the concern of the authorities to keep the country habitable and to protect and improve the environment," although, as we've seen, this provision has not been judicially enforced. Similarly, but more emphatically, the Constitution of Bhutan devotes an entire article to the protection of the environment, which, in addition to imposing duties on citizens to safeguard the environment, also imposes these obligations on the government: "The Royal Government shall (a) protect, conserve and improve the pristine environment and safeguard the biodiversity of the country; (b) Prevent pollution and ecological degradation; (c) Secure ecologically balanced sustainable development while promoting justifiable economic and social development; and (d) Ensure a safe and healthy environment." The Chilean Court has, as has already been noted, already used the affirmative obligation in that country's constitution to hold the government liable for failure to protect, as has the Turkish administrative court. This echoes the levels of obligation that have been identified by some courts even in the absence of textual adumbration.

These levels of obligation require progressively greater commitment on the part of the government (and sometimes private parties). Yet, even the most moderate level

may, in the hands of the right court, significantly constrain the government and obligate it to change its policies. For instance, licensing a company to clear-cut a forest may violate even the obligation to “respect” the environment.

Beyond that, under a constitution that requires the government to “protect” the environment, a court might require the government to take affirmative steps to create an environmental protection agency or to incorporate environmental concerns into its energy or economic development program. “Protection” could also require the government to take measures to ensure sustainability, since unsustainable development, by definition, fails to protect the environment.

A constitutional obligation to “promote” may authorize judicial orders not only to preserve, but also to improve the environment including, for instance, cleaning up a long-standing toxic waste site, reducing air or water pollution below current levels, and so on.

And finally, where the obligation to “fulfill” the right to a clean environment exists, a court may order the government to provide the means by which a clean and healthful environment can be enjoyed. For example, a government might be required to set aside land or waters as a nature reserve, or may be required to include green spaces within development plans for enjoyment by present and future generations.

Each of these levels requires not only increasing action from the State, but increasing resources as well. This is, of course, where the obstacles to judicial enforcement creep in. Plaintiffs are unlikely to sue where the payback is not worth the cost of litigation: if the most that can be gained under a “respect” case is the cancellation of one license, a putative litigant may not bother suing if it is likely that the government would simply issue another license to a different timber company the next year. Even if a plaintiff is successful in securing a judicial order mandating the development of an environmental plan, he or she may not have the resources to sue the following year to ensure that the plan is implemented. In some countries where environmental protection is most needed, it is least likely to be enforced for reasons of cost, if not also political will. Where millions live in deprived conditions with inadequate access to shelter and clean water, even a sympathetic court may not have enough muscle to force the government to “protect and improve the environment.” In any of these situations, the remedy may run against private or public entities if the constitutional rules permit horizontal application of constitutional norms, as discussed previously.

B. The Range of Remedies

1. Preventing Further Environmental Harm.

In the narrowest cases where the environmental right is vindicated, the court denies the remedy on environmental grounds. In these cases, the claimant typically seeks to vindicate a property interest of some kind, and the environmental issue arises by way of defense; to vindicate the environmental interest, the court denies the remedy sought by the claimant. Under its prior constitution, the Hungarian Constitutional

Court once rejected a proposed amendment that would have converted a protected forest into private land because it would have violated the constitutional right to a healthy environment to “the highest level of physical and spiritual health.” For cases like this to be successful, environmental advocates within and outside the government must be vigilant in identifying property, business, and development-oriented litigation that nonetheless raises environmental concerns. In Venezuela, in the 1990s, the Supreme Court of Justice invalidated a mining lease on some forest lands that had been previously granted by the Mining and Energy Ministry because it had ignored environmental consequences. In that case, the forest sectoral service of the Mining Ministry had challenged the government’s previous action.

2. Injunctions.

By far the most common remedy in environmental cases is injunctive relief aimed at stopping—and then remediating—the environmental degradation. Injunctions come in an almost infinite variety of shapes and sizes; a few of the most significant types are discussed here.

The most direct injunctions order the defendant to stop the activity that is producing the environmental harm. In one of the first cases brought by M.C. Mehta, the Indian environmental activist and lawyer, the Indian Supreme Court ordered the closure of the tanneries along a section of the Ganges because “life, health, and ecology have greater importance to the people” than the tannery work. In another case, the court enjoined mining activity on forest land even though the land came under the protection of the Conservation Act only after the mining license had been granted. The court explained that “the mining activities being a user of the forest land for non-forest purpose has to be stopped,” and further required the defendant to obtain additional authorization from the central government under the Act if it intended to continue similar activities. Similarly, the Supreme Court of Nepal prohibited the use of diesel trucks in the city of Kathmandu and courts in Bangladesh have at times been particularly active in this regard.

Courts in Latin America have been willing not only to remedy existing problems but to intervene in proposed projects and development programs in order to vindicate environmental interests. The Chilean Supreme Court enjoined the construction of six hydroelectric dams on Bio Bio River because the project failed to comply with environmental standards, threatening both environmental and human rights. And in *CODEFF v. Ministry of Public Works*, the Court stopped the extraction of water of Lake Chungará for an irrigation project because it would have raised salinity levels in a UNESCO biosphere reserve.

In other Latin American cases, courts have authorized the destruction of private property if necessary to stop the despoliation of the environment. In *Donato Furio Giordano v. Ministry Of Environment And Natural Resources*, the Supreme Court of Justice of Venezuela ruled that the destruction of private property (where some septic tanks had been polluting marine water) was not only authorized, it was not subject to restitution or compensation as government destruction of property normally would be because of the environmental hazard that such property posed. And in a case brought by the Ecuadorian government to enjoin illegal gold mining in

rivers, a provincial court held that given the failure of previous governmental efforts to stop the mining and based on the rights of nature, the government was authorized to destroy the mining machinery—an order which the government carried out with explosives a few days after the ruling.

Courts may also design injunctions not only to stop the threatened or ongoing degradation of the environment but to clean up or remedy damage that has already occurred. This may involve removal of debris, as it did in *Rural Litigation and Entitlement Kendra v. State of Uttar Pradesh*, where the Indian Supreme Court ordered lessees of lime stone quarries to “remove whatever minerals found lying at the site or its vicinity, if such minerals were covered by their respective leases and/or quarry permits.” The Court mandated the removal be completed by the lessees within four weeks.

Courts seem to be more likely to require immediate action when not only environmental rights are at stake but human rights as well. In the lime quarry case, the court held that “Article 21 of the Constitution guaranteeing the right to life must be interpreted to include the right to live in a healthy environment with minimum disturbances of ecological balance and without avoidable hazard to [the people] and to their cattle, homes and agricultural land and undue affection of air, water and environment.” It was likely the harm to the local residents that prompted the court’s order of immediate action. Likewise, in *Aurelio Vargas v. Municipality of Santiago*, the Supreme Court of Chile ordered the clean-up of a garbage dump within 120 days because of health considerations to neighboring residents. Where the harm to humans can be documented, defendants may be required not only to remediate but also to compensate the individuals for injuries incurred or likely to be incurred. In one Colombian case, where toxic fumes emanated from an open pit, defendants were required “to remediate the site and to pay past and future medical expenses to those who became sick.” The Court said it violated the right to life of local residents, even though the evidence concerned threats to their health, but not to their lives.

Some injunctions raise more complex separation of powers questions because they require not only a change of practice but also a change of policy. In some cases, courts have required governments to reorganize their bureaucracies with jurisdiction over the environment. The *Manila Bay* Court ordered the creation of a Manila Bay Advisory Committee to receive and evaluate the quarterly progressive reports submitted by the various agencies. In one case involving the adverse environmental effects of an electrical grid, the Supreme Court of Pakistan—instead of balancing the claims of competing stakeholders itself—ordered a *private* engineering consultant company, NESPAK, to manage the process. “In the problem at hand the likelihood of any hazard to life by magnetic field effect cannot be ignored. At the same time the need for constructing grid stations which are necessary for industrial and economic development cannot be lost sight of,” the Court explained. Because the government had proceeded without any attention to the hazards the grid might cause to human health, the Court appointed, “NESPAK as Commissioner to examine and study the scheme, planning, device and technique employed by [the government] and report whether there is any likelihood of any hazard or adverse effect on health of the

residents of the locality.” The government was then ordered to submit all the relevant information to NESPAK. The Court required the government in future cases to issue public notices and invite objections (orally or in writing) prior to installing or constructing any grid station or transmission line; this was to continue until such time as “the Government constitutes any commission or authority as suggested above.”

Courts have also ordered governments to create environmental plans where none previously existed. In fact, it has been argued that one of the principal benefits of constitutionalizing environmental rights is to create the political pressure necessary to compel governments to adopt statutory frameworks to protect the environment. In Nepal, the Supreme Court ordered the government to formulate national policies to protect objects of religious, cultural, and historical importance in keeping with environmental standards.

In other cases, the court limits itself to compelling further study of an environmental problem, as has happened in Sri Lanka and elsewhere. Some of these orders designate the timing, process, format, or contents of the study being ordered in order to minimize the government’s tendency to avoid the obligation or delay in its execution. In the Sri Lankan case, the court ordered that the mining interest was not permitted to enter into any contract relating to a particular phosphate deposit until the government conducted “a comprehensive exploration and study.” The court prescribed in detail some of the contents of the study, insisting that the study be done in consultation with the National Academy of Sciences of Sri Lanka and the National Science Foundation, and further requiring that the results of the study be published. As usual, the Indian Supreme Court has been painstaking in directing the process of public participation, ordering committees of experts to investigate the environmental implications of projects, In at least one case, requiring the clean-up of a mining site, the Indian court identified the particular individuals who should or should not be involved: “Such removal will be carried out and completed by the lessees within four weeks from the date of this Order and it shall be done in the presence of an officer not below the rank of Deputy Collector to be nominated by the District Magistrate, Dehradun, a gazetted officer from the Mines Department nominated by the Director of Mines and a public spirit[ed] individual in Dehradun . . . ” In a Colombian case involving the rights of marginalized people who earned their living by searching through trash to find recycled items to sell, the court ordered the formation of a committee within 2 weeks of the judgment to determine how best to integrate the recyclers into the formal economy, identifying the groups and interests who would be represented on the committee, including, unsurprisingly, representatives of the recyclers’ organizations. The committee, the court said, would participate in the design and implementation of a plan to include the recyclers into the local waste management economy and would design affirmative steps that must be taken to ensure their effective participation. The court further ordered the committee to submit a report to the constitutional court within seven months detailing not only its progress on the implementation of the plan, but the metrics it would use to determine the plan’s effectiveness in “the process of inclusion and in the effective enjoyment of rights by the recyclers and their families.” And in a land use planning case from Austria, the administrative court insisted on the need to

obtain an expert opinion about the environmental impact of a revision of the land use plan. Some of these remedial orders are related to or based on constitutionally entrenched procedural environmental rights.

Depending on the nature of federal-state relations in each country, judicial injunctions may issue against or in favor of sub-national units. In one case involving marine life, the Philippine Supreme Court upheld the power of local governments to promote the constitution's environmental values by capturing certain aquatic life in order to protect fish and corals.

Courts that are especially engaged in the vindication of constitutional environmental rights may issue elaborate injunctive orders that not only reflect real knowledge of the local conditions but deep empathy with the individuals affected by the balance of human and environmental interests. In an early Indian Supreme Court's environmental case, the court ordered the temporary closure of limestone quarries and further study to determine if they should be reopened and on what conditions. But, recognizing that the workmen employed at these quarries would be either temporarily or permanently "thrown out of work," the court insisted that "as far as practicable and in the shortest possible time, [they] be provided employment in the afforestation and soil conservation programme to be taken up in this area."

In another Indian case, the Supreme Court ordered the closure of stone-crushing businesses because of the environmental harm and damage to human life and health to nearby residents (as well as workers); but as stone crushing was already starting up in areas further from where people lived, the court ordered that additional lands be made available, and distributed by lots to those whose businesses had closed. As is common in the Indian Supreme Court, the court required reports by the responsible authorities and calendared a follow-up hearing.

But by far the most far-reaching environmental case of the Indian Supreme Court was the *Godavarman* case. In 1995, T.N. Godavarman Thirumulpad filed a writ petition to protect the Nilgiris forest from deforestation from illegal timber operations. Rather than limiting itself to ordering relief for the claim asserted, the Court used the case to develop and manage a new national forest policy, maintaining continuing mandamus for more than 10 years, and hearing over 800 interlocutory applications in the process. Initially, the court "ordered all non-forestry activities, such as saw mills and mining operations, which had not received explicit approval from the central government to cease operating immediately" and it temporarily but immediately suspended all tree felling in almost all the nation's forests. But the court did not stop there: it also established a new forest policy, thereby arguably usurping the legislative role, and it "ordered investigations into various complaints of illegal mining operations" thereby exercising executive authority. According to one group of critics, "the Court made itself a director and an overseer of forest issues, involving itself in national and local forest protection, timber pricing, timber transport, licensing of timber industries, management of forest revenue, and enforcement of its own orders concerning forest law, all independent of the central and state governments." While the court may be praised for recognizing the dire necessity of developing and

enforcing a serious forest policy, it is criticized for taking on the responsibility itself rather than ordering the central and local governments to act, even according to constitutional principles.

This is particularly problematic in the context of an issue as broad and complex as forest policy, where the conditions vary from region to region around the country, and where the implications are significant not only for purposes of economic growth and development but for the human rights of those who live near, within, and in reliance on the nation's forests.

Another landmark constitutional environmental cases, producing one of the most elaborate remedial orders ever involved Argentina's Matanza-Riachuelo river basin. In 2008, the Supreme Court of Argentina ruled in favor of a group of residents who had sued 44 companies as well as governmental authorities at the local, provincial, and national levels to demand clean up of the river basin, which has been the most contaminated in the country.

The Court's order was directed at all levels of government and at certain private parties who were deemed to have contributed to the disastrous condition of the river basin. The Court fully understood that remediation would take years and require the commitment and cooperation of many different entities and, in fact, it was only in response to the judicial reprimand that the Argentine Congress developed a plan to coordinate the clean up and allocated funds for its effectuation. Still, the pace of clean-up has been slow. According to one report, "There is an environmental management plan, but not much has been done, and the river is still contaminated. The Supreme Court has issued several follow-up judgements as a response to the lack of compliance. Judicial control of the implementation of the judgement seems to have been important to ensure compliance with the judgement."

In the *Manila Bay* case, the Philippine Supreme Court issued a comprehensive 12-point injunctive order, which directed not only the results to be accomplished; but the process to be used to ensure its accomplishment. The court's order required the meetings that government agencies must organize, studies to determine the adequacy of sewage facilities, that violators of environmental laws and regulations be apprehended, that licensing requirements be enforced, and so on. The Court also ordered the Education Department to "integrate lessons on pollution prevention, waste management, environmental protection, and like subjects in the school curricula of all levels to inculcate in the minds and hearts of students and, through them, their parents and friends, the importance of their duty toward achieving and maintaining a balanced and healthful ecosystem in the Manila Bay and the entire Philippine archipelago." Most of these requirements flowed from the statutory and regulatory framework but they were enacted, and enforced in this case, to vindicate the constitutional environmental right to a clean environment.

The Philippine Supreme Court is not the only court to require public information about environmentalism as a part of a remedial plan. In a landmark case involving noise and air pollution caused by vehicles in the city of Dhaka, the Bangladeshi Supreme Court directed the government to publicize "through print and electronic

media” the extant legal requirements and to “proceed against the vehicle operators by taking penal action if they fail to remove such types of prohibited horns after the expiry of the period of 30 days.” In the judicial orders regarding the replacement of diesel engines in government and other transport vehicles, the court ordered the government to “give publicity to the directions of this Court in print and electronic media on consecutive two days twice in a week for one month.” In *Karnataka Industries*, the Indian Supreme Court articulated the importance not only of environmental improvement but of what might be thought of as environmental acculturation: “The importance and awareness of environment and ecology is becoming so vital and important that we, in our judgment, want the appellant to insist on the conditions emanating from the principle of Sustainable Development.” To implement these principles, the Court directed that “in future, before acquisition of lands for development, the consequence and adverse impact of development on environment must be properly comprehended and the lands be acquired for development that they do not gravely impair the ecology and environment.” Such comprehension on the part of all the stakeholders requires that information be made available to all in advance of any decision that would adversely affect the natural environment.

As with the Indian Supreme Court’s continuing mandamus, the Bangladesh court also required the government to “submit reports every six months of actions and results of the ... above directions to this court.”

Despite the range and variety of judicial orders and the extraordinary efforts that some courts have made to ensure compliance with their orders, courts do realize that environmental rights are usually considered socio-economic rights which, in many systems, are not subject to individual demand or amenable to immediate implementation. In *Mazibuko v. City of Johannesburg*, the South African Constitutional Court explained that the constitutional right to water “does not require the state upon demand to provide every person with sufficient water without more.” Rather, the court said, “it requires the state to take reasonable legislative and other measures progressively to realise the achievement of the right of access to sufficient water, within available resources.” Indeed, the Constitution itself requires that “The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.” The *Mazibuko* court explained that a state’s compliance with this requirement would be measured by the reasonableness of its efforts, not by their success. While this disappointed many South African activists, the court maintained that courts “[A]re ill-suited to adjudicate upon issues where Court orders could have multiple social and economic consequences for the community. The Constitution contemplates rather a restrained and focused role for the Courts, namely, to require the State to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation.”

Thus, a litigant may always argue that the state has failed to develop a policy concerning the right—viz. environmental protection—or that the policy has not been adequately revised and updated, and has been allowed to lie dormant. However, the

Court emphatically rejected the notion that socioeconomic rights contain a particular “minimum core” which must be respected or provided in the legislative plan. The Colombian Constitutional Court has also adopted the principle of progressive realization, noting that it requires, at a minimum, for the state to provide a plan for the effective enjoyment of the right. (The idea of progressive realization derives from the International Covenant on Economic, Social and Cultural Rights which provides that: “Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.” While sourced in international law, it has been incorporated into the constitutional jurisprudence of many countries. In the South African *Mazibuko* case, for instance, the Court explained that: “The concept of progressive realisation recognises that policies formulated by the state will need to be reviewed and revised to ensure that the realisation of social and economic rights is progressively achieved.”).

Progressive realization—though not named as such—may also be seen in the continuing injunctions that many courts have issued in environmental cases. In the Bangladeshi industrial pollution case, the court ordered some existing industrial units and factories to adopt “adequate and sufficient measures to control pollution” within one year and others within two years, and in every case to report back to the court; it further ordered that no new industrial units and factories be, at any time in the future, “set up in Bangladesh without first arranging adequate and sufficient measures to control pollution.” This process instantiates and adapts to local conditions the principles of progressive realization.

In some cases involving future development, the Supreme Court of India has insisted that certain specified conditions be satisfied before land can be acquired or plants can be reopened. And in one notable case from Pakistan—initiated when a member of the court saw a newspaper notice about dumping of nuclear waste along a coastal area, which turned out to be unfounded—the court ordered not only that a list of all persons to whom coastal land had been allotted be submitted to the court but also that the state government submit the particulars of any application for future allotment of coastal lands. The Court took these actions because “[t]o dump waste materials including nuclear waste from the developed countries would not only be [a] hazard to the health of the people but also to the environment and the marine life in the region.”

Perhaps recognizing the limits of the judicial power, some of these courts have included in their mandatory orders provisions that are merely hortatory. In the Pakistani case, the court also suggested that the responsible authorities “should insert a condition in the allotment letter/license/lease that the allottee/tenant shall not use the land for dumping, treating, burying or destroying by any device waste of any nature including industrial or nuclear waste in any form.” In the *Lahore Pollution* case, the court went further and included a list of “suggestions... for formulating the policy and relevant rules and law.” In the *Manila Bay* case, the Philippine court required the budget department to “consider incorporating an adequate budget in the

General Appropriations Act of 2010 and succeeding years to cover the expenses relating to the cleanup, restoration, and preservation of the water quality of the Manila Bay.” And in the groundwater pollution case, the Indian Supreme Court asked the government to consider whether “chemical industries should be regulated separately and whether the siting of both new and existing plants should be revisited, given the water-intensive nature of the activities.” While the language was hortatory, the court insisted that the government’s quarterly reports include reference to these considerations. The extent to which these admonitions are in effect is a function of the relationship between the political authorities and the court.

Hortatory or suggestive orders may be particularly appealing to courts when enforcing directive principles of state policy that may be explicitly exempt from judicial review. In one such case, the Supreme Court of Nepal issued “a directive order ... to His Majesty’s Government ... to monitor whether the concerned authorities are complying with [both international and domestic laws], and then to take actions for maintaining uniformity in protecting all areas by formulating national policies regarding objects of religious, cultural and historical importance.” But, reflecting some impatience, the court demanded to see not only the efforts but the results: “It is not sufficient to state, in its written statement, that the government is alert about protection. Commitment should also be reflected by action and creation of public awareness. Plans adopted since 1954 should be evaluated for how successful they have been.”

Most injunctive remedial orders reflect well-recognized environmental law principles and values, including especially the precautionary principle and the norm that polluters pay for the costs of remediating the environmental harms they have caused. Some of these obligations are imposed as a matter of international law; the Treaty for the Functioning of the European Union, for instance, states that “Union policy on the environment ... shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.” Many governments have incorporated these principles into their framework laws and courts that are sensitive to the peculiarities of environmental damages have been quite willing to adopt them as a matter of their own domestic constitutional law. In seeking to protect the Taj Mahal, for instance, the Indian Supreme Court said, “the ‘primary duty’ of the government and its Ministry of Environment was to ‘safeguard’ the monument.” That court has further explained the policy underlying the polluter pays principle in this way:

The Polluter Pays principle demands that the financial costs of preventing or remedying damage caused by pollution should lie with the undertakings which cause the pollution, or produce the goods which cause the pollution. Under the principle it is not the role of Government to meet the costs involved in their prevention of such damage, or in carrying out remedial action, because the effect of this would be to shift the financial burden of the pollution incident to the taxpayer.

Another option, which has not been sufficiently developed, would be to require those whose activities may impact the environment to take out ecological insurance.

3. Damages.

In Colombia, as in other jurisdictions, the framework environmental laws permit damages to compensate for the misuse of natural resources, as well as punitive damages in some cases. A 1993 law, which the Constitutional Court upheld in 1996, also permits the application of retributive taxes on those whose activities contribute to environmental deterioration or unsustainability, such as in the case of waste dumping, as well as compensatory taxes and taxes for the usage of water. The court explained that a retributive tax is an obligatory payment imposed not for services provided but for the damage caused to the environment; it has, in that sense, the character of an indemnity.

Colombian law creates a more elaborate set of sanctions including preventative, compensatory, and punitive damages than is available in most other countries; this statutory scheme was upheld in 2011 against charges that the damage awards were ill-defined and that the law subjected defendants to liability multiple times for the same infraction. In an extraordinary opinion that recites at length the obligations that every country has to nature and to future generations, the court explained that “nature is not limited only to the environment surrounding humans, but also is a subject with its own rights which must be protected and guaranteed.” Consequently, the court held, a statutory scheme that imposes compensatory damages as well as restitution and that aims to restore nature to its previous condition is fully consistent with both constitutional and international law (including treaties to which Colombia is a party as well as those to which it is not). The defendant is usually in a better position than the plaintiff—particularly where the latter are individuals or non-profit organizations suing on behalf of underserved populations—to remedy the environmental harm because the defendant is likely to have significantly greater resources and means.

But, absent explicit constitutional or statutory authorizations, damages are not typically apt remedies for constitutional environmental violations. Damages shift the cost of engaging in objectionable behavior, but they put the burden of *remedying* the problem on the plaintiff. In environmental cases, however, courts that have been receptive to plaintiffs’ complaints are more likely to try to remedy the harm that has been done to the environment than merely make it more costly to harm it; a damage award does not help the broader swath of people who are affected by the environmental degradation, or future generations, or the environment itself. Moreover, where the defendant is the government, as is typically the case in constitutional litigation, courts may be hesitant to exact costs from the national treasury if doing so would result in a windfall to the plaintiffs, particularly where the injuries are widespread and affect more people than those who litigated. Government defendants may also be immune from damages awards under constitutional or statutory authority. Damage awards in environmental cases can also lead to additional and prolonged litigation about the size of the award, particularly when there are significant resources at stake, as for instance in the epic

litigation in Ecuador against Chevron/ Texaco. In such cases, civil suits for damages may be authorized but need to be filed and pursued separately. Even in these jurisdictions, however, costs may be awarded. Finally, there are constitutional cultures, particularly in Asia, in which damage awards are rare in general and no more common in environmental cases.

Where they are permitted, a damage award may be a part of a remedial order, but in few cases does it completely resolve the controversy.

4. Compliance Orders

Courts in many countries have available to them something akin to a writ of mandamus—a judicial order that requires the defendant to satisfy a pre-existing duty. Often, plaintiffs seek such a writ in part because compliance is more readily ensured, and in part perhaps because they truly believe that defendants are under a legal obligation to take a particular action. However, courts can be reluctant to use the writ if the legal duty is not “definite and fixed,” as the Supreme Court of Nepal said. In one case from the Philippines, the Supreme Court dismissed a petition seeking mandamus because, even though the corporate defendant may have violated the fundamental right to clean air, the legislature had not specifically required the use of natural gas and so the court could not require it by way of mandamus. Indeed, the power of the writ of mandamus may come from the court’s inherent authority in certain cases or it may come from the mandatory language of a statute. In the Philippines, the court required all the government entities involved in remedying the pollution in Manila Bay to submit a quarterly progressive report “in line with the principle of ‘continuing mandamus.’” In *Ratlam v. Vardhichand*, the Supreme Court of India compelled a municipal council to carry out its duties to the community by constructing sanitation facilities, pursuant to clear and mandatory statutory authority. The Court ordered the municipality—under penalty of imprisonment—to construct the drains and fill up cesspools and other pits of human and industrial waste, notwithstanding the municipality’s claimed penury. The court observed, “[t]he Criminal Procedure Code operates against statutory bodies and others regardless of the cash in their coffers, even as human rights under Part III of the Constitution have to be respected by the State regardless of budgetary provision.” And yet, according to a subsequent report, at least eight agencies are jointly responsible for some aspect of Delhi’s drainage and sanitation infrastructure, leading not to over-enforcement but to under-management and to significant health hazards for the nearly four million people who open storm-water drain systems for waste disposal. “These open drains,” according to this report, “experience blockage and over-flooding from excessive waste and are a growing safety and health concern throughout populated regions of Delhi/NCR.” A number of injuries have resulted when people accidentally fall into the open drains.

It may seem odd or unproductive to expend resources to ask a court to order the government to do what it is already obligated to do. But this strategy can produce dividends. In India, for instance, “[t]he main thrust is to substitute the ineffective administrative directives issued by the pollution control boards under the Water Act and the Environment (Protection) Act, with judicial orders, the disobedience of which

invites contempt of court action and penalties.” Government’s nonfeasance in the first place invites judicial review, with the burden usually falling on the party challenging the action and with the typical deference to coequal branches of government; government’s failure to comply with a court order, however, shifts the burden to the government to justify its nonfeasance and removes any presumption in favor of the government that might otherwise exist. It also eliminates separation of powers concerns that might otherwise deter judicial involvement.

5. Imprisonment

Where none of these remedies is sufficient to vindicate environmental rights, repair the damage to the environment, and deter or prevent further abuses, some courts have resorted to the ultimate penalty of imprisonment. In one case, from Antigua and Barbuda, the High Court of Justice ordered sentences of one month each to three government officials for violating a previous interim injunction that sought to forbid a company, Sandco, from mining sand. The Ministry of Mining officials mined the sand instead but then sold it on the spot to Sandco, which the court found to be a clear violation of the interim injunction. Imprisonment under certain circumstances may be statutorily authorized, as in such Indian framework laws as the Water (Prevention and Control of Pollution) Act of 1974, the Environment (Protection) Act of 1986, and the Air (Prevention and Control of Pollution) Act of 1981.

The variety and flexibility of tools in these courts’ remedial toolkits facilitate judicial involvement in the vindication of constitutional environmental rights even in situations where courts might otherwise be tempted to yield to principles of comity and to succumb to concerns about their own legitimacy. But in the words of the Indian Supreme Court—certainly the institution with the longest-term and deepest commitment to the creative remediation of environmental degradation — “the correct exposition of law in a modern welfare Society” prohibits the court from sitting “idly by” while officials abdicate their legal responsibilities. “The law,” the Court has said, “will relentlessly be enforced and the plea of poor finance will be poor alibi when people in misery cry for justice. . . . The officers in charge and even the elected representatives will have to face the penalty of the law if what the constitution and follow-up legislation direct them to do are denied wrongfully. The wages of violation is punishment, corporate and personal.” Clearly, courts have a range of remedies from which to choose in giving effect to environmental constitutionalism.

C. Challenges to Enforcement

Enforcement of judicial orders, particularly in environmental cases, is rarely without its obstacles. In the first Ecuadorian rights of nature case, for instance, the government had taken no steps in the year after the court order to implement the order to clean up the damage done to the river and adjoining property, notwithstanding clear directions from the court, forcing the litigants to pursue follow-up enforcement actions.

Remedial orders in constitutional environmental cases are among the most difficult to enforce for several reasons. First, as we have seen, injunctive orders can be multi-

faceted and extensive, often requiring multiple entities to coordinate action. Second, they can be time-consuming in both the long-and short-term. The development of a plan may take months but its full implementation may take years or go on indefinitely. Third, environmental regulation *in general* comes at the expense of other important societal goals such as development and industrialization, which are the primary interests of most defendants, both private and public. And these defendants almost invariably constitute the power and economic elite of the country. In combination, these conditions provide ample incentive to defendants who would prefer to ignore or avoid judicially-imposed obligations.

In response, courts have developed certain practices aimed at overcoming these challenges. As we have seen, courts in some countries will regularly require reports and other indications of progress. They also often retain jurisdiction over the cases to facilitate plaintiffs' efforts to hold defendants responsible, often explicitly inviting further litigation to ensure compliance. In one case involving industrial pollution, the Bangladesh Supreme Court asserted that the environmental advocacy group, BELA, which had brought the suit, was "at liberty to bring incidents of violation of any of the provisions of the Act and the Rules made there under to the notice of this court." In that case, the Court also said that "the respondents were at liberty to approach this court for directions as and when necessary so that the objectives of the Act can be achieved effectively and satisfactorily." In some situations, courts have remained alert to persistent controversies resulting from their decisions and have had to issue increasingly emphatic follow-up judgments to compel compliance, as has happened in the Colombian cases involving the livelihood of recyclers and the Pakistani case involving pollution in the city of Lahore.

Where courts have maintained their vigilance, there have in some cases been notable successes. As a result of the landmark *Minors Oposa* decision, it has been claimed, "Logging concessions were withdrawn and abandoned at such a pace that the one hundred and forty-two concessions that existed when Oposa first took up the issue had shrunk to three by 2006." The cleanup of Manila Bay after the Supreme Court's decision in that case provides another example of effective litigation.

Ensuring enforcement of court orders is difficult, though not impossible to do. The history of environmental litigation, constitutional and otherwise, is littered with examples of abandoned litigation. Indeed, one commentator contends that the *Oposa* litigation was never fulfilled because the original plaintiffs did not pursue the matter after the Philippine Supreme Court's remand. In Chile, where indigenous and other groups were able to stop construction of dams on the Bio River in the early 1990s because of failures to comply with regulations, the government was able, within 10 years, to pursue construction of other dams when the additional hurdles were overcome. The moderate victory is the increased participation of the affected communities and increased sensitivity to environmental concerns as new and ongoing hydroelectric projects are pursued. In Nepal, the nongovernmental organization Pro Public has been forced to adopt "a comprehensive strategy for obtaining compliance" with court orders.

Litigating claims borne in environmental constitutionalism requires a continued commitment not only on the court's part but also on the part of the plaintiffs who originally brought the suit or their successors. And this is problematic as well: continued vigilance on the part of plaintiffs privatizes the burden for securing what is clearly a public good and it requires the plaintiffs to ensure, on an ongoing basis, that the government takes responsibility for the environmental violation, and that the government complies with the rule of law as mandated by the judicial branch. Enforcing even favorable judgments thus requires significant resources on the part of the original litigants and their lawyers. As the Bangladeshi organization, BELA, has said: "winning a court case is only the first step."

D. Reference Materials

The following decisions provide examples of judicial remedies that have been ordered to address contraventions of environmental rights, including *Beatriz Mendoza* (Argentina) and *Padillaa Gutierrez* (Costa Rica).

1. Beatriz Silvia Mendoza and others v. National State of Argentina (Argentina 2008)

Supreme Court of Argentina, July 8, 2008

(Available at <https://www.escri-net.org/caselaw/2011/mendoza-beatriz-silva-et-al-vs-state-argentina-et-al-damages-damages-resulting>.)

Translated by Michael Posner, Visitor at FARN from the Human Rights Program of Harvard Law School)

Applicable Precepts and Facts:

1) That in light of the presentation . . . by sixteen people exercising their personal rights in their capacity as victims of the environmental contamination of the Matanza-Riachulo river basin, with some of them also exercising the rights of their minor children, in order to bring various allegations against the National State, the Province of Buenos Aires, the Government of the Autonomous City of Buenos Aires and the forty- four named businesses, this Court issued a judgment on June 20, 2006, . . . adopting several pronouncements. The pronouncements which are relevant to the present action include:

a) Declaring this Tribunal's lack of original jurisdiction with respect to the claim aimed at redressing damage caused to the individual plaintiff's assets as an indirect result of aggression towards the environment.

b) Accepting the filing of the matter governed by Article 117 of the National Constitution, which addresses pollution of inter-jurisdictional environmental resources, and accepting the National State and the Province of Buenos Aires as legally recognized parties to this matter. Under the terms governed by Articles 41 and 43 of the Fundamental Law¹¹⁸ and Article 30 of Law 25.675, the National State and the Province of Buenos Aires have the duty to ensure the common use of the environment and the collective well- being shaped by the environment, an environmental stewardship pursued through prevention, restoration, and ultimately, through compensation for collective harm, according to Article 28 of Law 25.675 (considering paragraph 7).

c) Exercising this Tribunal's ordained faculty and legally recognized power to protect the general interest. To that end, this Court:

¹¹⁸ [Section 41 of the Constitution of Argentina states:

"All inhabitants are entitled to the right to a healthy and balanced environment fit for human development in order that productive activities shall meet present needs without endangering those of future generations; and shall have the duty to preserve it. As a first priority, environmental damage shall bring about the obligation to repair it according to law.

The authorities shall provide for the protection of this right, the rational use of natural resources, the preservation of the natural and cultural heritage and of the biological diversity, and shall also provide for environmental information and education.

The Nation shall regulate the minimum protection standards, and the provinces those necessary to reinforce them, without altering their local jurisdictions. . . ."]

I. Requested from the defendant-businesses information relating to all waste thrown into the river; whether they have treatment systems for that waste; and if they have contracted insurance for their activities, as required by Article 22 of Law 25.675.

II. Ordered the National State, the Province of Buenos Aires, the Autonomous City of Buenos Aires, and the Federal Environmental Council (CoFeMa) to present an integrated plan which addresses the area's environmental situation, control over anthropogenic activities, an environmental impact study of the defendant-businesses, an environmental education program, and an environmental informational program. . . .

3) That . . . several organizations submitted a request for standing, citing constitutional and non-constitutional text in order to intervene as third-parties in accordance with Article 90 of the Civil and Commercial Procedural Code of the Nation (citing Articles 41 and 43 of the National Constitution and Article 30 of Law 25.675). They expressed that their objective was to ensure that the defendants carried out, among other mandates, the requisite actions for the immediate cessation of contaminating activity and the restoration from the collective environmental damage in the area of the Matanza-Riachuelo River Basin.

This tribunal, in its' pronouncement on August 30, 2006, granted in part the seven organization's petition for intervention as third-parties, admitting only the Environment and Natural Resource Foundation (FARN), Greenpeace Foundation Argentina, Center for Legal and Social Studies (CELS), and the Boca Neighborhood Association. The Court felt that these organization's structural objectives, as found in their respective organic statutes, made participation as third parties appropriate. In this sense, the justification for acceptance as third- parties was not based on the General Interest Framework or the ample connection with the fulfillment of the National Constitution and Argentine laws, but instead by considering the legitimate interests of these organizations in the preservation of a collective right such as the right to a healthy environment....

4) That in a joint submission effectuated August 24, 2006, the National State, the Province of Buenos Aires, the Autonomous City of Buenos Aires and CoFeMa invoked their answer to the Tribunal's request from its' June 20th pronouncement. The submission noted a consensus between the three government jurisdictions regarding the structural dimension of the problem, the decision to join forces in order to reach a solution, and also noted in particular the significance that the National Government has given to the environmental problem. The Integral Plan for the Clean-up of the Matanza- Riachuelo River Basin also accompanied the submission. The parties described the principle features of the clean-up program, its institutional and political structure in regard to the clean-up itself, and the social aspect of the clean-up. They also exhibited the requested environmental impact evaluations, offered final considerations, and submitted complementary documentation. . . .

6) That on September 5, 2006 the Tribunal began the scheduled hearing. On that date the plaintiffs explained in detail the contents and justification for their claim. For his part, the Secretary of the Environment and Sustainable Development of the Nation, as the representative for the government defendants, presented in front of the Court regarding the Integral Plan for the Clean-Up of the Matanza-Riachuelo River Basin. The Secretary was subsequently questioned by the members of this Court about various aspects of the clean-up program. . . .

The hearing continued on September 12, on which date the businesses had an opportunity to address the Court, orally presenting their reports. The businesses were also questioned by the Tribunal. . . .

7) That through the pronouncement on February 6, 2007, with respect to the Integral Plan for the Clean-Up of the Matanza-Riachuelo River Basin, this Court ordered the National State, the Province of Buenos Aires, and the Autonomous City of Buenos Aires to inform the Court of all adopted and completed measures dealing with contamination prevention, restoration, and environmental auditing, as well as measures relating to the environmental impact assessments of the defendant businesses. Lastly, the Court requested information on actions taken related to the industrial sector, the local population, and health care and prevention. Towards that end, a new public hearing was scheduled for February 20, 2007. At that time, the Secretary of the Environment and Sustainable Development of the Nation presented the requested report, answered several requests made by this Court, and submitted accompanying documentation, as requested, in support of the various areas of the mandated clean-up plan.

8) That on February 23, 2007, the Tribunal, after emphasizing that at this stage of the proceeding it lacked the knowledge necessary to issue a ruling, and once again in accordance with its ordained faculties and powers, ordered the intervention of the University of Buenos Aires. Through the work of professors with backgrounds and expertise in the various relevant fields, the University would proceed to inform the Court of the feasibility of the Clean-Up Plan presented by the State authorities. . . .

10) That in view of the presentation by the University of Buenos Aires of the requested report, the Tribunal again utilized its powers recognized in Article 32 of Law 25.675 and in Article 36 of the Procedural Rules in order to convene a public hearing so that the parties and intervening third-parties could orally express their observations of the Integral Plan for the Clean-Up of the Matanza-Riachuelo River Basin. Parties were also to be able to express their observations on the report prepared by the University of Buenos Aires regarding the feasibility of the Clean-Up Plan, presenting evidence in an attempt to contest the scientific aspects of the decision.

11) That said hearing began on July 4, 2007, with an opportunity for the Secretary of the Environment and Sustainable Development of the Nation, acting as the representative for the National State, the Province of Buenos Aires, and the

Autonomous City of Buenos Aires, to conduct his exhibition. The Ombudsman of the Nation, the representatives of some non-governmental organizations intervening as interested third-parties, and representatives of those defendants which chose to participate in this public hearing also received an opportunity to speak. . . .

12) That on August 22, 2007, the Tribunal issued the decisions which are detailed below.

On the defense side, and based on the results of the public hearings and the report prepared by the University of Buenos Aires, the Court gave notice that in order to carry forward the prevention and restoration aspect of the case it was necessary to order the collection of precise, up-to-date, public, and accessible information. Towards that end the Court imposed on the River Basin Authority and the representative for the three State defendants the obligation to inform the Court of the condition of the water, the air, and the underground systems of the river basin. The Court also requested a list of the industries currently in the river basin which conducted potentially contaminating activities, with specific pollutant figures. The Court further requested the minutes from the meetings carried out by the River Basin Authority as well as information from their other activities, reports on population and industry movement from the basin, information on petrochemical projects in the Dock Sud region, utilization of green credits, garbage clean-up, cleaning of the river banks, current and future projects for the expansion of the potable water network, storm drains, sewage systems, progress updates on their projects, the feasibility of their deadlines, definitive costs, financing information for all of the projects, and any additional information on their emergency health plan.

14) That the government defendants submitted the requested reports, which were then subsequently amplified by the River Basin Authority. . . .

By order of the Court, summaries from the plaintiffs and third parties as well particular defenses were ordered, along with the accompanying documentation for each one of the responses. . . .

Whereas:

15) The restoration from and the prevention of environmental harm requires the issuance of urgent, definitive, and effective decisions. In accordance with this principle, the present decision definitely resolves the specific claim regarding restoration and prevention that has gone through this urgent and autonomous process.

The decisive goal is forward-looking and fixes the general criteria required for effective compliance with the stated objective, while still respecting the methods for compliance, methods which are left to the discretionary scope of the administration. Thus, the obligation for compliance should aim at achieving results and meeting the presently described objectives, while leaving the specific procedures to carry out those objectives up to the administration's determination.

At the same time, given the definitive nature of this decision, the process of execution will be delegated to a federal court of first instance, in order to ensure swiftness of future court decisions as well as effective judicial control over compliance.

However, as a consequence of the decision adopted, proceedings related to the indemnification for damages will continue to occur in front of this Court, since said damages do not deal with future action but rather with the attribution of liability stemming from past conduct.

The dictated sentence consists of a binding mandate on the defendants, with specific details that arise from the legal bases which follow and whose content has been determined by this Tribunal in exercise of powers deriving from the Constitution and the General Environmental Law. . . .

Regarding the Integral Plan for the Clean-up of the Matanza-Riachuelo River Basin presented by the defendants, various hearings have been convened which illustrate deficiencies that this Court must take into account. . . .

Moreover, effective implementation requires a program that fixes behavior defined with technical precision, the identification of a subject who is obligated to comply with the decision, the existence of objective indices that allow periodic control over the results, and ample participation in that control.

16) The River Basin Authority, created by Law 26.168, is obligated to carry out the program, and will assume the responsibility for any non-compliance or delays in carrying out the detailed objectives. The Authority must maintain members from the National State, the Province of Buenos Aires, and the Autonomous City of Buenos Aires, to whom responsibility primarily corresponds for territorial settlement of the watershed region and to whom environmental obligations from the National Constitution, as well as more rigid local norms, apply. The responsibilities and obligations of these three entities have been recalled by this Court since its first intervention through the above-mentioned pronouncement on June 20, 2006.

17) The present decision mandates that the River Basin Authority complete the following program:

l) Objectives:

The program must pursue three simultaneous objectives, consisting of:

- 1) Improvement of the quality of life of the river basin inhabitants;
- 2) The environmental restoration of all of the river basin's components (water, air, and soil);

3) The prevention of reasonably foreseeable harm.

In order to measure the level of completion of these objectives the River Basin Authority must adopt one of the available international measurement systems and notify the relevant tribunal of their execution of this decision within 90 (ninety) business days. Failure to comply with this decision within the prescribed period will result in the imposition of a daily fine on the president of the River Basin Authority.

II) Public Information:

Organize within 30 (thirty) business days a system of public information on the internet for the general public. The system must be clear, concentrated, and accessible, and it must contain all of the up-to-date facts, reports, lists, timelines, costs, etc., which were requested by the August 22, 2007 resolution.

Failure to comply with this order within the prescribed period will result in the imposition of a daily fine on the president of the River Basin Authority.

III) Industrial Pollution:

1) Conduct inspections of all of the businesses currently in the Matanza-Riachuelo river basin within 30 (thirty) business days;

2) Identify those businesses deemed polluters through the issuance of a resolution from the River Basin Authority;

3) Mandate that all such businesses deemed polluters, who dump waste, discharges, or emissions into the river basin, must present to the relevant authority a treatment plan within 30 (thirty) business days from the date of notification via the issuance of a resolution by the River Basin Authority, as described above in (2);

4) Analyze and determine within 60 (sixty) business days the feasibility of the treatment plans referred to in (3), and where appropriate, approve said plans;

5) Order that the businesses whose treatment plans have not been submitted or approved – through a resolution from the River Basin Authority – cease in the spilling, emitting, or discharging into the river basin of any polluting substances. The promulgation of resolutions to that affect may not exceed the deadline of 180 (one hundred eighty) days from the present;

6) Adopt measures for partial or full closure and/or relocation. The River Basin Authority is empowered to extend the deadline or propose alternative measures when it is determined that the economic costs of treatment are unfeasible or when a grave social situation exists;

7) Notify the businesses of the existing lines of credit available to them for this purpose;

8) The public presentation, updated quarterly, of the condition of the water and underground systems, and the air quality of the river basin;

9) The public presentation, detailed and well-founded, of the industrial conversion and relocation project through the framework of the Agreement Act of the action plan, along with for environmental suitability of petrochemical activities in the Dock Sud area, the businesses involved, the affected population, signed conventions, stages and deadlines for completion;

10) The public presentation of the progress and estimated timing of the planned initiatives of the Federal Subprogram Framework for the Urbanization of Villas and Squatter Settlements – Clean-Up of the Matanza- Riachuelo River Basin – Stage One, from November 21, 2006.

Failure to comply with any of these established deadlines will result in the imposition of a daily fine on the president of the River Basin Authority.

IV) Clean-Up of Landfills:

Regarding the task of landfill clean-up from the Integral Plan, the River Bank Authority must:

1) Ensure within 6 (six) months the execution of the following:

a) The necessary measures to stop waste disposal into landfills which will be closed, whether they were legal or clandestine;

b) Measures for the implementation of the program submitted to this Court for the prevention of new open air landfills;

c) Measures to eradicate the homes near landfills and to subsequently prevent the construction of new homes along them.

2) Order the eradication, clean-up, and closure, within 1 (one) year, of all illegal landfills discovered by the River Basin Authority. . . .

V) Cleaning the Riverbanks:

Regarding the task of cleaning the riverbanks under the Integral Clean-Up Plan, the River Basin Authority must inform in a public manner, with details and well-founded support, the following:

1) The finalization of the rodent control, clean-up, and weeding phase of the four individual sectors from the Integral Clean-Up Plan, including deadlines and pertinent budgets;

2) The progress of the public works project to transform the river bank into public parks, in accordance with the provisions of the Integral Clean-Up Plan, including deadlines and pertinent budgets.

VI) Expansion of the potable water network:

Regarding the task of expanding the potable water network addressed in the Integral Clean-Up Plan, the River Basin Authority must publicly inform, in a detailed and well-supported manner, on the plan headed by Water and Sanitation Argentina (AySA) and the National Organization for Sanitary Hydraulic Works (Enohsa) for the expansion of water catchments, treatment, and distribution. . . .

Failure to comply with any of these established deadlines will result in the imposition of a daily fine on the president of the River Basin Authority.

VII) Storm Drainage:

Regarding the task of storm drainage addressed in the Integral Clean-Up Plan, the River Basin Authority must publicly inform, in a detailed and well-supported manner, on the plan for storm drainage works, with particular emphasis on projects that must be completed in 2007, on projects currently being carried out, and on the commencement of works for the expansion of the storm drainage network in the period 2008-2015. In all cases, compliance deadlines and the pertinent budgets must be included.

Failure to comply with any of these established deadlines will result in the imposition of a daily fine on the president of the River Basin Authority.

VIII) Sewage Sanitation:

Regarding the task of sewage sanitation addressed in the Integral Clean-Up Plan, the River Basin Authority must publicly inform, in a detailed and well-supported manner, on the expansion projects headed by Water and Sanitation Argentina (AySA). . . .

IX) Emergency Health Plan:

. . . [T]he River Basin Authority is required to do the following:

1) Within 90 (ninety) days create a socio-demographic map and conduct investigations into environmental risk factors for the purpose of:

a) Determining the at-risk population;

b) Developing a diagnostic database for all diseases in order to aid the determination of pathogens produced by air, soil, and water pollution, along with other pathogens which are not dependent on those factors. Also develop a system

for tracking the detected cases in order to verify the prevalence and survival of those pathogens;

c) Developing a publicly accessible Registry Information System Database of the pathogens detected in the river basin;

d) Specifying the epidemiological surveillance measures taken in the emergency zone.

2) Upon completion of the requirements in (1), the River Basin Authority must, within (60) sixty days, elaborate and put into effect specific health programs to meet the needs of the river basin population.

Failure to comply with any of these established deadlines will result in the imposition of a daily fine on the president of the River Basin Authority.

18) Beyond the provisions from Law 26.168 and the constitutional norms which apply to each jurisdiction, this Tribunal considers transparency when dealing with government management of public resources to be of the utmost institutional importance. To that end, an authority must be responsible for this transparency. Thus, the Auditor General of the Nation will monitor the allocation of funds and all Plan-related budget implementation. . . .

Notwithstanding the above, the judge in charge of program execution may submit any questions related to budget control and execution to the River Basin Authority. The River Basin Authority must respond in a detailed manner within 10 (ten) business days. Also, if any of the subjects who are entitled to observe the information exercise that right, the River Basin Authority must hold a public hearing in its' headquarters within 10 (ten) business days, during which the Authority must explain any non-conformance.

Failure to comply with any of these established deadlines will result in the imposition of a daily fine on the president of the River Basin Authority.

19) It is equally as important to strengthen citizen participation in the monitoring of completion of the program described above.

Said control must be organized through the appointment of a coordinator who is capable of receiving citizen suggestions and of relaying to citizens the proper processes.

To that end, in recognition of their full functional autonomy of not receiving instructions from any other State power, the designation of citizen monitoring coordinator must lie with the Ombudsman of the Nation. The Ombudsman will form a collegiate body with the representatives of the non-governmental organizations who intervened in the cause as third-parties, coordinating these NGO's operations and distributing tasks to them. Tasks should include the reception of updated

information and the formulation of concrete plans to present to the River Basin Authority in order to better achieve the mandated goals, and tasks should be guided by the criteria of equality, specialization, reasonableness, and effectiveness.

20) Since the nature and content of this decision is a final declaration over the restoration and prevention issue, a prudent consideration in anticipation of the various circumstances which may arise from the present mandates is demanded.

At this juncture, the Tribunal must make a decision which is the result of carefully balancing two circumstances.

The first – which has been sufficiently identified and emphasized by the June 20, 2006 pronouncement on this matter in order to justify the dismissal of the claims for individual damages . . . – is that this Court must maintain rationality in the cases it hears and decides, so as not to overstep the responsible exercise of the power granted to it by the Supreme Law, which grants this Court jurisdiction as final interpreter, as the last guardian of people's highest rights, and as a participant in the republican form of government.

The other circumstance stems from the institutional requirement that the decisions of this Court are loyally respected, and is mentioned because of the acknowledged power of the River Basin Authority. Any frustration of the constitutional jurisdiction exercised through this pronouncement, whether by the River Basin Authority or any other subject reached by this decision, including national and local authorities, the judiciary, or administrative agencies, must be avoided. In the well-known precedent P.95.XXXIX Ponce, Carlos Alberto v/ San Luis, Province, from February 24, 2005 (Decision: 328:175), through rulings issued in the first instance, it was established that this Tribunal must judge whether their decisions have been followed, and if not, the Court must take all the necessary steps to ensure strict compliance with its decisions. This includes dismantling the consequences stemming from any local authority's pronouncements which were intended to neutralize, paralyze, or ignore, in whole or in part, mandates issued by this Court.

These considerations, along with the need to preserve a significant level of immediacy of judicial decisions, lead this Tribunal to consider it appropriate and competent to issue this decision according to the terms of Article 499 of the Civil Procedure and Commercial Code of the Nation. It is also appropriate for a federal judge of first instance with jurisdiction over the river bank territory to address the further questions that arise from this case. Considering the jurisdiction addressed by Article 3 of Law 25.519, the report submitted by the Secretary of General Administration regarding human resources, and the decisive fact of its recent inception (2/2006), intervention is granted to the Federal Court of First Instance of Quilmes.

21) In addition to timely enforcement of the decision, the Federal Court of First Instance of Quilmes will also conduct judicial review of contested promulgations by the River Basin Authority (Articles 18 and 109 of the National Constitution). This jurisdiction which will be exclusive in order to ensure uniformity

and consistency in the interpretation of questions that arise, as opposed to opening up heterogeneous or even contradictory criteria that might result from review by different judges of first instance. . . . Moreover, in order to make the procedural rules clear, it is appropriate to eliminate intervention by any other judiciary, so that decisions by the magistrate whose intervention has been ordered will be considered equivalent to pronouncements by the superior tribunal for this matter. Thus, challenges brought in front of this Court will not have to first pass through any intermediate court. The delegated tribunal will also have the necessary power to determine the value of the daily fines stemming from non-completion of deadlines. Fines should be of a sufficient quantity in order to deter reticent conduct. Also, the tribunal will be able to order investigations into any crimes that result from non-completion of the judicial mandates in the present decision. . . .

Therefore it is resolved:

1. The verdict is issued with respect to the claims aimed at environmental restoration and prevention.
2. To order the River Basin Authority, created by Law 26.168, to complete the program established by this decision.
3. To provide that the National State, the Province of Buenos Aires, and the Autonomous City of Buenos are equally and concurrently responsible for the implementation of said program.
4. To establish that the Auditor General of the National will monitor the allocation of funds and the budget implementation related to the Integral Clean-Up Plan.
5. To enable citizen participation in the monitoring of the Clean-Up Plan and the present program.
6. To entrust the Ombudsman of the Nation with the coordination of said citizen participation, through the formation of a collegiate group whose members will consist of representatives from the non-governmental organizations who participated as third parties in this action.
7. To confer to the Federal Judge of First Instance of Quilmes jurisdiction to hear all questions related to the implementation of this pronouncement and for the review of final decisions made by the River Basin Authority, according to the jurisdictional reach established above in (20) and (21).
8. To order the joinder of all proceedings and current litigation, where appropriate, according to the pronouncement in (22).
9. To maintain in front of this Court aspects of this cause relating to restitution for collective damage.

10. To order the sending of accurate copies, both paper and electronic, of all relevant materials to the Federal Court of Quilmes, so that the judges will have at their disposal all of the pertinent documentation to handle arising questions.

11. To postpone the pronouncement on costs until the sentence for the claim
still pending in front of this court is issued.

2. Padilla Gutierrez, Clara Emilia y otros, todos en su condición de vecinos de lugares aledaños al Parque Nacional Marino Las Baulas de Guanacaste c/ SETENA, Secretaria Técnica Nacional Ambiental (Costa Rica, 2008)

CORTE SUPREMA DE JUSTICIA DE COSTA RICA, Sala Constitucional

4.- INTRODUCCIÓN.-

El Parque Nacional Marino Las Baulas de Guanacaste, fue creado por decreto Ejecutivo N° 20518- MIRENEM del 09.07.91 y luego se le dio el rango legal mediante Ley N° 7524 del 10.07.95.- Se señala claramente que la conservación y protección absolutas de las tortuga baula y su hábitat de anidación, constituye el fin principal de la creación del Parque Nacional Marino Las Baulas de Guanacaste. Se indica que las playas Grande, Ventanas y Langosta de Costa Rica, es una de las tres áreas de mundo donde anida y se reproduce la tortuga baula (*Dermochelys coriacea*). Esta área tiene una enorme importancia si se considera que la "Lista Roja de Especies Amenazadas de la Unión Mundial para la Naturaleza", categoriza a la tortuga baula de especies en peligro crítico. Asimismo en el área anidan también otras especies de tortugas, como la carpintera, la tortuga negra o toras, y la tortuga carey. También se encuentran varias especies de flora y fauna en peligro de extinción (mangles, árboles de guayacán, caoba y pachote), animales (venados, congos, leones breñeros), aves (garzas blancas y rosadas, halcones, gavilanes), saurios (caimán y cocodrilo americano), y boas, el reptil de mayor tamaño conocido. Según la Convención para el Comercio internacional de especies amenazadas de flora y fauna, CITES, se encuentra en peligro de extinción. Por otra parte, los manglares del Parque, se encuentran dentro de RAMSAR, la Convención relativa a Humedales de Importancia Internacional, y son fundamentales como hábitat de aves acuáticas y áreas de reproducción de diferentes especies marina y forestales.

Por lo expuesto, la tortuga baula, ha sido declarada una especie en extinción. Siendo una de las amenazas más evidente cada temporada, el desarrollo turístico y urbanístico sin control en las playas de anidación. La zona de PLAYA GRNADE, donde se ubica el Parque Nacional Marino LAS BAULAS, es considerada como de extrema vulnerabilidad, de manera que "no se debe permitir ningún tipo de actividades productivas, solamente aquellas enfocadas a la conservación".

Esta sentencia de la Corte Suprema de Justicia de Costa Rica, se dicta en el marco de un RECURSO DE AMPARO promovido por un grupo de vecinos del Parque Nacional LAS BAULAS contra la "SETENA", SECRETARIA TÉCNICA NACIONAL AMBIENTAL, por haber violado, según se sostuvo en la demanda, en perjuicio de los amparados, lo dispuesto en el artículo 50 de la Constitución Política, ya que dentro del PARQUE NACIONAL LAS BAULAS y en sus zonas de AMOTIGUAMIENTO, se pretende la construcción de varios complejos residenciales y de cabinas y hoteles de grandes dimensiones, sin que hasta el momento hayan sido sometidos en forma integral, previamente a una EVALUACIÓN DE IMPACTO AMBIENTAL por parte de SETENA para establecer su viabilidad; dicha evaluación, se sostuvo en la demanda, pretende ser subsanada por esta Autoridad, mediante la evaluación de la

construcción de cada casa que se pretende construir, sin embargo, esto no es suficiente porque pierde de vista toda la perspectiva de la afectación de los proyectos circundantes. También se dijo en el escrito de encabezamiento que “no se estableció el impacto en el agua para consumo humano, tampoco la afectación respecto de las aguas servidas, negras, vida silvestre, y en especial el recurso que protege el Parque y todo su ecosistema. Cómo afectarán las luces, la presencia humana, la presencia de mascotas sobre los nidos y recién nacidos, el acceso de esos vecinos nuevos a las playas de anidación, el equipo náutico, el ruido, aguas jabonosas, aspectos todos que no fueron tomados en consideración. Por último, los recurrentes solicitan que se ordene “evaluar el proyecto en forma conjunta y no casa por casa”.-

... A su vez, SETENA en su responde, informa que se limita a analizar individualmente cada proyecto pero no realizar la evaluación en conjunto del desarrollo regional; sosteniendo que cuenta únicamente con competencia para evaluar los formularios, documentos y estudios que se presenten, pero no tiene competencia para realizar estudios por sí misma. Las evaluaciones ambientales que realiza consisten en el análisis de los documentos y escritos que se presentan a su consideración, referentes a dos tipos de procedimientos distintos: la evaluación de impacto ambiental, analizando individualmente cada proyecto y la evaluación de impacto ambiental estratégica, que comprende el análisis de las políticas, programas y planes de ordenamiento territorial que se sometan a la misma.- Asimismo apunta que “del memorial de interposición del recurso se desprende que los recurrentes desean que se realice una evaluación ambiental estratégica y como la competencia de Setena se limita al análisis de los documentos que se presentan, procede a las Municipalidades u otros entes someter a evaluación por parte de la Setena los instrumentos de evaluación ambiental estratégica que esas instituciones realicen.- ...

De manifestaciones adicionales de los demandantes se dijo que en el informe rendido por SETENA se acepta que las evaluaciones cercanas al Parque Nacional Marino Las Baulas se hacen en forma aislada porque nadie les ha solicitado que hagan una evaluación estratégica. Se agrega que no es cierto que SETENA no tenga competencia para realizar esa labor incluso de oficio, “pues es inaudito que si se tiene en claro que se está ante 200 casas dentro de la zona de amortiguamiento del Parque simplemente se señale que la evaluación integral del proyecto corresponde a las Municipalidades”.- Además, el Departamento de Cuencas Hidrográficas del Instituto Costarricense de Acueductos y Alcantarillados presentó en la causa, un informe de una visita que realizó al sector costero de Playa Grande, indicando que la existencia de piscinas en muchas casas construidas, “compromete en forma muy seria y preocupante la oferta de agua subterránea que es explotada actualmente como fuente principal de abastecimiento” recomendando entre otras consideraciones, “desarrollar un estudio hidrogeológico de todo el acuífero de Playa Grande en donde se indique su capacidad de almacenamiento, su actual estado de aprovechamiento y su capacidad potencial, de igual forma se debe determinar su vulnerabilidad a la contaminación”, por lo que concluye que “la Municipalidad debe establecer una moratoria en el desarrollo de la construcción hasta que no se tengan

los resultados del estudio indiciado”, y finalmente, hasta tanto no se resuelva el recurso hídrico no resulta posible que se sigan autorizando más y más construcciones del Sector de Playa Grande y sus zonas aledañas. Solicita entonces que se ordene a Setena no aprobar ningún estudio de impacto ambiental de construcción alguna en las zonas adyacentes al Parque Nacional Marino LAS BAULAS de Guanacaste, especialmente en el sector de PLAYA GRANDE, hasta tanto no se tengan los instrumentos para valorar de manera integral el impacto del proyecto de construcción que se pretende desarrollar en la zona y no se cuente específicamente con un estudio hidrogeológico de todo el acuífero de Playa Grande.

Posteriormente, vuelve a manifestar la recurrente que aporta un nuevo estudio realizado por un ingeniero de la Escuela de Geología de la Universidad de Costa Rica, donde concluye que el mapa de vulnerabilidad intrínseca evidencia que el sector más vulnerable se encuentra en el Estero Tamarindo, Estero Ventanas, Playa Grande y Tamarindo, por lo que es necesario tomar medidas de protección del recurso hídrico; en los sectores de vulnerabilidad extrema no se debe permitir ningún tipo de actividades productivas.- En el mismo sentido, lo informado en oficio del 23 de noviembre de 2006, por el Área de Aguas Subterráneas de Senara, quienes concluyeron que “actualmente se encuentran restringidos los permisos de perforación de pozos en los acuíferos del Potrero, Brasilito, Playa Grande y de Huacas-Tamarindo, debido a los estudios y evaluaciones técnicas que evidencian problemas relacionados a la contaminación”.

La instrucción probatoria, atento la complejidad del caso, incluyó audiencias judiciales con el Ministro de Ambiente y Energía, los miembros del Consejo Nacional de Áreas de Conservación, el Director Ejecutivo del Sistema Nacional de Áreas de Conservación, el Director del Área de Conservación de Tempisque, el Administrador del Parque Nacional Marino Las Baulas, el Director del Departamento de Aguas, todos del Ministerio de Ambiente y Energía, para que informen sobre el estado actual de las construcciones en las propiedades que están dentro del Parque Nacional Las Baulas, las previsiones que se han tomado para la protección del recurso hídrico, la recolección de desechos sólidos, la afectación respecto de la tortuga baula y todo su ecosistema.- Y consecuentemente, para que informen si, el desarrollo urbanístico de la zona, está afectando o podría afectar negativamente al ambiente, indiquen además el estado actual en que se encuentran las expropiaciones que se piensan realizar en la zona.

También, el Tribunal pidió información a la Municipalidad de Santa Cruz, Municipalidad de Nadayure y la Municipalidad de Hojancha, para que informen el estado actual de las construcciones en las propiedades que están dentro del Parque, todos los permisos que se han dado, previsiones para la protección del recurso hídrico; el Instituto Costarricense de Acueductos y Alcantarillados, concretamente el Departamento de Cuencas Hidrográficas, para que informe si el desarrollo urbanizados está afectando o podría afectar negativamente el ambiente del Parque Nacional, concretamente al recurso hídrico, para consumo humano, tratamiento de aguas negras y servidas; el Secretario General de la Setena, que informe el nombre de las personas jurídicas y físicas, y sus domicilios, que tienen proyectos inmobiliarios dentro del Parque, a las que les ha otorgado viabilidad ambiental o que

tienen pendiente dicho trámite; provisiones para la protección del recurso hídrico, la recolección de desechos sólidos, la afectación del tortuga BAULA y todo su ecosistema.- Por último, se solicitó informe el Director de la Escuela de Biología Marina de la Universidad Nacional, Maestría de Ciencias Marina y Costeras; el Director de la Facultad de Biología de la Universidad de Costa Rica, los recurrentes, la Procuraduría General de la República.

La Corte Suprema estima en sentencia, como “debidamente demostrados” los siguientes hechos relevantes: 1.- Que NO EXISTE NI SE HA REALIZADO una evaluación de forma integral del impacto que las construcciones dentro y en la zona de amortiguamiento del Parque Nacional Marino LAS BAULAS, producirían sobre los recursos naturales colindantes: la tortuga BAULA, el recurso hídrico, demás vida silvestre, y en general todo el ecosistema. 2.- Que dentro del Parque y sus zonas de amortiguamiento se pretende la construcción de VARIOS COMPLEJOS RESIDENCIALES, CABINAS Y HOTELES.- 3.- Que el Parque cuenta con una zona de influencia, constituyendo la banda de 500 metros a lo largo del límite continental el Área de influencia inmediata, la cual es la zona de amortiguamiento, y que constituye un área ambientalmente frágil: fragilidad biológica- terrestre, fragilidad hídrica, fragilidad por desarrollo urbano.- 4.- Que el DESARROLLO URBANÍSTICO planteado para Playa Grande y Ventanas dista mucho de ser un desarrollo sostenible. De llevarse a cabo estos proyectos dentro de una franja de los 75 metros y sin ningún control del área protegida y su zona de amortiguamiento, se estará frente a un deterioro ambiental irreversible, con una afectación directa sobre el área de anidación más importante de todo el Pacífico Oriental para las tortugas BAULA y sobre los manglares que protege el Parque, incluyendo el SITIO RAMSAR.- 5.- Que la Municipalidad de Santa Cruz, ha otorgado permiso de construcción a proyectos ubicados dentro del área de influencia inmediata al Parque Nacional Marino LAS BAULAS, área frágil ambiental, incluso sin contar con la respectiva viabilidad ambiental. 6.- Que las evaluaciones que realiza SETENA, consisten en el análisis de documentos y estudios que se presenten a su consideración, referentes a dos tipos de procedimientos: “Evaluación de impacto ambiental” EIA donde analiza individualmente cada proyecto y la “Evaluación ambiental estratégica” EAE, el cual se refiere al análisis de las políticas, programas y planes de ordenamiento territorial que le someten los Municipios u otros entes.- Siendo que este último instrumento no se ha aplicado en el Parque Nacional Marino LAS BAULAS.- Por lo demás, se da por probado que la Setena suspendió mediante resolución, la EIA de los proyectos DENTRO del Parque, hasta que la Sala Constitucional disponga otra cosa.- Que en cuanto a la zona de amortiguamiento, Setena está valorando los procedimientos de evaluación ambiental, aunque solicitará que los desarrolladores asuman el compromiso de cumplir con los lineamiento para la protección de la tortuga BAULA emitidos por el SINAC. Por último, un detalle de los proyectos situados DENTRO del Parque que cuentan con viabilidad ambiental (2); FUERA del Parque que cuentan con viabilidad ambiental (19) calificados en general, casa habitación y condominios residenciales.-

El fondo del asunto se concentra en determinar si resulta cierto que dentro del Parque Nacional Marino LAS BAULAS y su zona de amortiguamiento (500 mts

colindantes con los límites del Parque), se pretende la construcción de varios complejos residenciales sin haber sido sometidos a una evaluación integral de impacto ambiental por parte de la SETENA, sino que cada proyecto ha sido valorado de forma individual. Hecho que se comprueba, en consecuencia se desprende que efectivamente SETENA ha otorgado la viabilidad ambiental a proyectos en dicha zona, tanto a las propiedades ubicadas dentro del Parque Nacional Marino como las que se encuentran en la zona de amortiguamiento, de forma individual, sin haber hecho un análisis del impacto integral que tales construcciones producirían en todo el ecosistema. El desarrollo urbanístico planteado para la Playa Grande y Ventanas dista mucho de ser un desarrollo sostenible, y que de llevarse a cabo estos proyectos dentro de la franja de 75 metros y sin ningún control fuera del área protegida y su área de amortiguamiento se estará frente a un deterioro ambiental irreversible, con una afectación directa sobre el área de anidación más importante en todo el Pacífico Oriental para las tortugas baula y sobre los manglares que protege el Parque, incluyendo el sitio RAMSAR.

El hecho de que Setena haya estado otorgando la viabilidad ambiental a proyectos situados, no solo en la zona de amortiguamiento del Parque sino dentro del mismo Parque, de forma individual, sin haber procedido primero, a realizar una valoración integral de la zona, evidentemente pone en riesgo todo el ecosistema del área. Se advierte que ya fueron otorgados dos viabilidades ambientales a proyectos dentro del Parque y que diecinueve más están en trámite, todo ello sin contar con el número exacto de viabilidades otorgadas y en trámite en la zona de amortiguamiento de dicho Parque, “pudiendo preverse que si dentro del Parque no ha existido mayor reparo en el otorgamiento de las viabilidades ambientales, con mucho menos razón se tendrá reparo en su otorgamiento en la zona de amortiguamiento”, a pesar de que el impacto ambiental de los proyectos ubicados dentro de esta zona, igualmente resultan significativos. El descuido de la zona de amortiguamiento es tal, que la misma SETENA informa “que apenas se está valorando los procedimientos de evaluación a solicitar”.

De esta forma, la viabilidades ambientales otorgadas de forma individual por SETENA resultan insuficientes para la protección que el ambiente de la zona costera requiere. Siendo claro que no se ha evaluado en forma integral el impacto ambiental que producirían las construcciones dentro del Parque ni en la zona de amortiguamiento. Cabe señalar que lo anterior es interpretado por la Sala Constitucional de la Corte, con fundamento en el principio precautorio que opera en materia ambiental, como un “riesgo potencial a todo el ecosistema del Parque.- Así entonces, no es suficiente para el Tribunal ni para la garantía del derecho a gozar de un ambiente sano y ecológicamente equilibrado, que Setena haya procedido con el trámite individual de otorgamiento de viabilidades ambientales, ni mucho menos cuando se contextualiza la situación con el deber de vigilancia que tiene el Estado sobre la materia, la seriedad y contundencia de múltiples estudios realizados a nivel mundial que advierten sobre el peligro de extinción de la tortuga baula y la necesidad de evitar procesos constructivos cerca de los lugares de anidamiento.

6.- AVANCES.-

El reconocimiento de diversos instrumentos de política ambiental en materia de evaluación de impacto ambiental, individual vs. estratégico.- La necesidad de un análisis cuidadoso, amplio, e integral para el otorgamiento de la Viabilidad Ambiental de proyectos de impactos ambientales significativos.- La necesidad de proceder a la valoración integral del proyecto de construcción de complejos hotelero, residencial, condominios y urbanístico.- La efectiva aplicación del Principio Precautorio.- El enfático deber de vigilancia que pesa sobre el Estado, en esta clase de situaciones.- La imperiosa búsqueda del desarrollo urbanístico y turístico, en condiciones ambientalmente sostenibles.- La importancia de una enérgica temprana, anticipatoria, y oportuna, defensa y conservación de áreas de especial protección, que se califican de ecosistemas frágiles y vulnerables, como asimismo de la zona de Influencia o amortiguamiento, en el caso, representada por una banda de unos 500 metros de superficie, colindantes con el Parque Nacional Marino Las Baulas.- La tutela de las especies de nuestra fauna (en este supuesto, la tortuga baula), y flora, amenazadas en peligro o en vías de extinción.

7.- ACUERDO.-

Dada la importancia y protección del Parque Marino Las Baulas desde el punto de vista de conservación y protección del ambiente, dado que SETENA ha estado otorgando la viabilidad ambiental a proyectos situados dentro del parque y su zona de amortiguamiento de forma INDIVIDUAL sin haber hecho un análisis del impacto INTEGRAL que tales construcciones producirían en todo el ecosistema del Parque, dado que la Municipalidad de Santa Cruz ha otorgado permisos de construcción dentro del Parque y su zona de amortiguamiento incluso sin contar con la respectiva viabilidad ambiental, y tomando en cuenta EL PRINCIPIO PRECAUTORIO EN MATERIA AMBIENTAL se acoge el recurso, con todas las consecuencias que se detallan en la parte dispositiva, por lo que se hace lugar a la demanda disponiendo: 1.- Anular todas las viabilidad ambientales otorgadas en la propiedades dentro del Parque y se ordena al Ministerio de Ambiente continúe de inmediato con el proceso de expropiación de tales propiedades.- 2.- Ordenar a Setena, girar instrucciones para no tramitar nuevas viabilidades dentro del Parque.- 3.- Ordena a Setena, proceda en coordinación con el Ministerio de Ambiente y energía, el Instituto Costarricense de Acueductos y Alcantarillados y las Municipalidades de Santa Cruz, Bandayure, Hojancha, Nicoya Y Carrillo, a realizar un estudio integral sobre el impacto que las construcciones y el desarrollo turístico y urbanístico en la zonas de amortiguamiento del Parque Nacional Marino Las Baula, producirían al ambiente y las medidas necesarias a tomar, en donde se valore si conviene mejor también expropiar las propiedades que se indiquen allí, y se indique expresamente el impacto que el ruido, las luces, el uso del agua para consumo humano, las aguas negras y servidas, la presencia humana y otros produciría sobre todo el ecosistema de la zona, en especial, la tortuga baula. 4.- Dejar suspendidas y supeditar la validez de las viabilidades otorgadas a la propiedades ubicadas dentro de la zona de amortiguamiento del Parque, hasta tanto no esté listo el estudio integral. 5.- Ordenar a SETENA, suspender el trámite de las solicitudes de viabilidad ambiental de las propiedades ubicadas dentro de la zona de amortiguamiento.- 6.- Ordenar a la Municipalidad de Santa Cruz, dejar suspendidos y supeditar la validez de los permisos de construcción otorgados a las propiedades ubicadas dentro de la

zona de amortiguamiento (banda de 500 metros) del Parque, hasta tanto no esté listo el estudio integral.- 7.- Anular todos los permisos de construcción otorgados, si así lo hubiera hecho la Municipalidad de Santa Cruz, a las propiedades ubicadas en zonas de amortiguamiento; en su caso, comunicar este fallo a la Contraloría General de la República, para que realice las investigaciones y sienta responsabilidades.- 8.- Al Secretario General de Setena, Ministro de Ambiente y Energía, Director Ejecutivo del Consejo Nacional de Áreas Protegidas, Director Superior del sistema Nacional de Conservación, Jefe del Departamento de Cuencas Hídricas de Acueductos y Alcantarillados, Alcalde las Municipalidades de Nandayure, Santa Cruz, Carrillo y Nicoya, a tomar todas las medidas y previsiones dentro del ámbito de sus competencias a efectos de preservar todo el ecosistema del Parque Nacional Marino Las Baulas.- Todo ello, bajo apercibimiento de que podría incurrir en el delito tipificado en el artículo 71 de la Ley de la Jurisdicción Constitucional (no cumplir o no hacer cumplir orden judicial en un recurso de amparo, que prevé penas de prisión de 3 meses a 2 años o de 20 a 60 días de multa).- Se condena al Estado y a la Municipalidad de Santa Cruz al pago de las costas, y daños y perjuicios causados con los hechos que sirven a esta declaratoria, los que se liquidarán en ejecución de sentencia de lo contencioso administrativo....

3. Consejo de Defensa del Estado c/ García Brocal Julio y otro (Chile, 2013)

Corte Suprema de Chile

MJCH_MJJ36039 | ROL:4033-2013, MJJ36039

La calificación de daño ambiental significativo queda demostrada por tratarse de una corta ilegal de araucarias, especie declarada monumento natural, además del menoscabo que se generó al suelo y otros recursos forestales en un bosque de más de 150 años de antigüedad de gran belleza escénica.

Doctrina:

1.- Se anula de oficio al sentencia atacada, toda vez que el razonamiento contenido en el fallo en cuanto se refiere que no se acreditó el hecho dañoso teniendo únicamente en consideración para ello un error en la mención del predio en que habría tenido lugar la corta no autorizada de bosque nativo, carece de justificación, apartándose del examen de la prueba bajo el prisma de las pretensiones y alegaciones formuladas por las partes. Queda en evidencia entonces que la sentencia recurrida no cumple con las exigencias del N° 4 del artículo 170 del Código de Procedimiento Civil, por la falta de consideraciones de hecho que deben servir de fundamento al fallo, de lo que se sigue la invalidación de la sentencia viciada en virtud de haberse verificado la causal de nulidad formal prevista en el N° 5 del artículo 768 del citado Código.

2.- La responsabilidad por daño ambiental instituida en nuestro ordenamiento jurídico persigue que los responsables reparen a sus víctimas de todo daño, obligándolos especialmente a restaurar el paisaje deteriorado. La Ley N° 19.300 establece un sistema de responsabilidad subjetivo, a su vez, con el objeto de mitigar el sistema subjetivo de responsabilidad, se contemplan presunciones legales de la misma. La intervención del legislador en estos términos tiende a robustecer el sistema y la eficacia de las acciones que se interpongan para reclamar, puesto que la transgresión a tales normativas sólo puede constituir una acción

3.- Se encuentra acreditado que los demandados realizaron un trazado de camino provocando daños en un bosque nativo de araucarias y lengas, infringiendo la normativa ambiental vigente. Constatadas las infracciones y no desvirtuadas, se configura la presunción de responsabilidad contemplada en el artículo 52 de la Ley N° 19.300, presunción legal que descansa en la culpabilidad del ejecutor de la acción que se reprocha.

Santiago, tres de octubre de dos mil trece.

Vistos:

En estos autos Rol N° 6042-2004 seguidos ante el Tercer Juzgado Civil de Temuco, el Estado de Chile dedujo demanda de reparación por daño ambiental en conformidad a los artículos 53 y 54 de la Ley N° 19.300 sobre Bases Generales del Medio Ambiente en contra de Julio García Brocal y de la sociedad J.G.B. S.A., representada por el primer demandado.

Mediante sentencia de treinta y uno de mayo de dos mil doce, el mencionado tribunal desestimó la acción deducida.

Apelado dicho fallo por la parte demandante, la Corte de Apelaciones de Temuco mediante sentencia de catorce de mayo de dos mil trece, lo confirmó.

En contra de esta sentencia de segunda instancia, el mismo litigante dedujo recurso de casación en el fondo.

Se trajeron los autos en relación.

Considerando:

Primero: Que constituye causal de nulidad formal, de acuerdo a lo establecido en el artículo 768 N° 5 del Código de Procedimiento Civil, el haberse dictado la sentencia con omisión de alguno de los requisitos establecidos en el artículo 170 del mismo texto legal, cuyo numeral 4° exige de las sentencias la exposición de las consideraciones de hecho y de derecho que sirvan de fundamento a la decisión.

Segundo: Que la sentencia recurrida rechazó la demanda al concluir que "no se encuentra probado el hecho dañoso que se aduce", sustentando esta afirmación en que la prueba documental acompañada por el propio demandante consistente en Informe Técnico de Corta No Autorizada e Informe Técnico N° 4/2004 emanados de CONAF IX Región, daban cuenta que la corta de lengas y araucarias se produjo en la Hijueta N° 8 de la comunidad indígena Pedro Calfuqueo y no en la Hijueta N° 11 de esa misma comunidad, como se alegaba en el escrito de la demanda.

Tercero: Que, como se advierte, los jueces de la instancia estimaron que no se encontraba acreditado el daño ambiental denunciado en razón de un error en la identificación del predio dañado, no obstante que los aludidos informes emanados de CONAF indicaban claramente que los perjuicios ambientales habían sido provocados en la aludida Hijueta N° 8.

Cuarto: Que asimismo desatendieron la multiplicidad y precisión del resto de la prueba rendida que ponía de manifiesto que la tala de especies nativas alegada estaba circunscrita a la Hijueta N° 8. En efecto, el informe pericial decretado en los autos indicó claramente el lugar inspeccionado, señalando que "concuera con los antecedentes entregados por CONAF el año 2004", los cuales se referían a la intervención de la Hijueta N° 8.

Por su parte, la parte demandada reconoció que había realizado actividades en dicho lote, añadiendo que contaba con las autorizaciones pertinentes.

Quinto: Que cabe resaltar que el demandante es claro en fundar su acción en el daño ambiental provocado por la tala de araucarias araucanas y lengas con ocasión de la construcción de un camino para la extracción de productos madereros, de 2 kilómetros de largo y 6 metros de ancho en la comunidad indígena Pedro Calfuqueo, de manera que el error de referencia que se deslizó en la demanda tampoco pudo acarrear indefensión a los demandados, desde que tal yerro no alteró la descripción del lugar intervenido ni de los daños.

Sexto: Que, en consecuencia, el razonamiento contenido en el fallo en cuanto se refiere que no se acreditó el hecho dañoso teniendo únicamente en consideración para ello un error en la mención del predio en que habría tenido lugar la corta no autorizada de bosque nativo, carece de justificación, apartándose del examen de la prueba antes referida bajo el prisma de las pretensiones y alegaciones formuladas por las partes.

Séptimo: Que queda en evidencia entonces que la sentencia recurrida no cumple con las exigencias del N° 4 del artículo 170 del Código de Procedimiento Civil, por la falta de consideraciones de hecho que deben servir de fundamento al fallo, de lo que se sigue la invalidación de la sentencia viciada en virtud de haberse verificado la causal de nulidad formal prevista en el N° 5 del artículo 768 del citado Código.

Octavo: Que el artículo 775 del Código de Procedimiento Civil dispone que pueden los tribunales, conociendo por vía de apelación, consulta o casación o en alguna incidencia, invalidar de oficio las sentencias cuando los antecedentes del recurso manifiesten que ellas adolecen de vicios que dan lugar a la casación en la forma, situación que se presenta en este caso como se demostró en los considerandos anteriores, lo cual hace que el fallo en comento incurra en un vicio de invalidez que es menester declarar, desde que influye sustancialmente en lo dispositivo de tal resolución.

Por estas consideraciones y visto, además, lo dispuesto en los artículos 768 N° 5, 786 y 808 del Código de Procedimiento Civil, se anula de oficio la sentencia de la Corte de Apelaciones de Temuco de catorce de mayo de dos mil trece, escrita a fojas 423, la que se reemplaza por la que se dicta a continuación, separadamente, pero sin nueva vista.

Téngase por no presentado el recurso de casación en el fondo deducido en lo principal de fojas 425.

Acordada la decisión de invalidar de oficio con el voto en contra del Abogado Integrante señor Pfeffer, en consideración a que la motivación que sustenta la decisión jurisdiccional de desestimar la acción ambiental es clara en cuanto estimar que no se acreditó la corta ilegal de bosque nativo en la Hijueta N° 11 de la comunidad indígena Pedro Calfuqueo, como así fue postulado por la parte demandante, imputación precisa que fue negada por los demandados, quienes demostraron no haber realizado actividad alguna en el predio que se identificó como dañado.

Regístrese.

Redacción a cargo del Abogado Integrante señor Baraona y de la disidencia, su autor.

Rol N° 4033-2013.

Pronunciado por la Tercera Sala de esta Corte Suprema integrada por los Ministros Sr. Sergio Muñoz G., Sr. Héctor Carreño S., Sr. Ricardo Blanco H. y los

abogados integrantes Sr. Jorge Baraona G. y Sr. Emilio Pfeffer U. No firma, no obstante haber concurrido a la vista y al acuerdo de la causa, el Ministro señor Muñoz por estar con feriado legal. Santiago, 03 de octubre de 2013.

Autoriza la Ministra de Fe de la Excma. Corte Suprema.

En Santiago, a tres de octubre de dos mil trece, notifiqué en Secretaría por el Estado Diario la resolución precedente.

Santiago, tres de octubre de dos mil trece.

En cumplimiento a lo dispuesto en el inciso tercero del artículo 786 del Código de Procedimiento Civil, se procede a dictar la siguiente sentencia de reemplazo.

Vistos:

Se reproduce la sentencia en alzada con excepción de sus considerandos décimo y undécimo, que se eliminan.

Y teniendo en su lugar y además presente:

Primero: Que don Óscar Exss Krugmann, Abogado Procurador Fiscal, en representación del Estado de Chile, dedujo demanda de reparación de daño ambiental fundada en que el día 28 de febrero de 2003 funcionarios de la Corporación Nacional Forestal -en adelante, CONAF IX Región- constataron la corta de bosque nativo de araucaria y lenga en un predio ubicado en el sector de Icalma, comuna de Lonquimay, Región de la Araucanía, sin contar con la autorización de la autoridad forestal. El inmueble afectado es de una superficie de 2.199,18 hectáreas ubicado dentro de la comunidad indígena Pedro Calfuqueo.

Señala que el objeto de la corta fue la construcción de un camino que permitiera el transporte de madera desde predios vecinos al afectado, siendo los responsables de su ejecución los demandados Julio García Brocal y la empresa J.G.B.S.A., cuyo representante es este último.

Expresa que de acuerdo a informes técnicos elaborados por Conaf IX Región sobre esta corta no autorizada, el camino se levantó en un bosque de araucaria araucana de no menos de 150 años de antigüedad, destruyéndose con motosierras y maquinaria pesada gran cantidad de ejemplares adultos y de regeneración natural de la misma especie. En relación a la lenga se cortaron árboles con diámetros promedio de 40 centímetros. La superficie dañada de bosque alcanzó los 2 kilómetros de largo por 6 metros de ancho, esto es 1,2 hectáreas, en terrenos de elevada pendiente y precipitaciones que bordean los 2.000 milímetros al año por tratarse de una zona cordillerana.

Expone que como en la generalidad de los casos de corta de bosque a tala rasa, los daños ambientales constatados no se limitan a los recursos forestales, sino que han afectado la totalidad del ecosistema, incluido el suelo, agua, flora, fauna y el valor paisajístico del lugar, destacando que la zona afectada es de una gran belleza escénica.

Añade que conforme a los informes confeccionados por los especialistas de la CONAF IX Región, se han evidenciado en el predio afectado los siguientes daños ambientales: inicio de procesos erosivos y formación de cárcavas en la parte alta del camino construido en forma ilegal; pérdida de suelo y disminución de su calidad nutritiva; exposición de raíces de árboles adultos a los efectos secantes del sol y del aire, lo cual afecta significativamente su vigor y estabilidad; arrastre y acumulación de material sedimentario hacia las partes bajas y socavamiento del terreno; acumulación de madera que obstaculiza los cursos de agua y genera erosión hídrica; y alteración del hábitat de aves y animales como la destrucción de nidos y madrigueras.

En síntesis, recalca que el innegable daño ambiental se caracteriza principalmente por la destrucción de araucarias y lengas, ambas especies endémicas y únicas de nuestro país, y en el caso de la araucaria araucana se trata de una de las especies más longevas de Sudamérica, difícilmente reproducible y en peligro de extinción.

Solicita que se condene a los demandados a la reparación material del daño ambiental, especialmente a la reforestación del área afectada, así como a todas aquellas medidas conducentes al control de los procesos erosivos que se es tan generando. Entre las medidas de reparación que propone ejecuten los demandados están las siguientes: a) Limpiar íntegramente la zona afectada. b) Reforestar el área dañada con araucaria araucana y lenga en una densidad de 1.800 plantas por hectárea. c) Proteger las raíces y estabilidad de los árboles que se encuentran en los alrededores de la zona directamente afectada. d) Las obras necesarias para canalizar los cauces de agua afectados por la corta con el objeto de disminuir la erosión hídrica, para la corrección de pendientes y estabilización de taludes en las laderas de la zona afectada.

Segundo: Que los demandados contestan manifestando que no han efectuado trabajo alguno en la hijuela que precisa la demandante -N° 11- sino en otras que señala -1, 5, 7 y 8-. Por otra parte, expresa que a consecuencia de la topografía del lugar es imposible determinar el número de especies afectadas y su superficie y que de ser efectivas las afirmaciones de la demanda fiscal, no ha existido un daño fiscal significativo.

Tercero: Que se establecieron como hechos sustanciales, pertinentes y controvertidos a probar:

1.- Efectividad de haberse efectuado por parte de los demandados trabajos de corte de bosque nativo sin contar con autorización de la autoridad forestal.

2.- Especies arbóreas taladas y superficie afectada.

3.- Perjuicios originados al medio ambiente con ocasión de la ocurrencia de tales hechos. Naturaleza y extensión de los mismos.

4.- Relación de causalidad entre la corta o tala de especies y los daños o perjuicios que se invocan.

Cuarto: Que la parte demandante rindió la siguiente prueba documental:

I) Copia de informe técnico de corta no autorizada elaborado por fiscalizadores de CONAF IX Región, que da cuenta que en la Hijuela N° 8 de la comunidad indígena Pedro Calfuqueo, en el sector de Icalma, se constató el día 28 de febrero de 2003

los siguientes hechos constitutivos de infracción: corta no autorizada en contravención a lo dispuesto en el artículo 21 del Decreto Ley N° 701 sobre Fomento Forestal, y corta no autorizada de la especie araucaria araucana en contravención a lo dispuesto en el Decreto Supremo N° 43. Se individualiza al infractor: Julio García.

Se consigna en el informe que se detectó la construcción de un camino con maquinaria pesada en aproximadamente 2 kilómetros de largo y 6 metros de ancho, indicándose que en el lugar se encontraba el jefe de faena, quien entregó antecedentes sobre la empresa que los contrataba. Se deja constancia, a su vez, que el trazado del camino se hizo en parte en un bosque puro de araucaria araucana, verificándose en terreno la corta, desraizamiento y/o destrucción de a lo menos 25 ejemplares de la especie en cuestión y la eliminación de al menos 84 ejemplares de regeneración.

Finaliza señalando que existe corta no autorizada de la especie lenga y que el trazado y construcción del camino tuvo por objeto acceder a 4 hijuelas colindantes de la comunidad, las cuales cuentan con Planes de Manejo simples autorizados por CONAF, cada uno por 40 ejemplares de lenga.

II) Copia de Informe Técnico N° 4/2004 denominado "Impactos ambientales a raíz de corta no autorizada de araucarias- sector Icalma", de 3 de septiembre de 2004, preparado por el ingeniero forestal de CONAF, Alfredo Mascareño Domke, quien realizó una inspección técnica en terreno el día 14 de abril de 2004. Expone que tomó contacto con integrantes de la comunidad Pedro Calfuqueo, verificó las actuales condiciones de la vegetación nativa, particularmente de la especie araucaria y los efectos ambientales generados por la construcción de un camino de acceso a la madera. Expresa que observó -acompañando fotografías- las siguientes situaciones: obstaculización de escorrentías naturales e inicio de procesos erosivos; inicio de procesos erosivos en la parte alta; pérdida de suelo y exposición de raíces; arrastre y acumulación de material sedimentario hacia las partes bajas; destrucción de regeneración de araucaria por derribamiento de ejemplares adultos; remoción de tierra alterando las condiciones naturales de suelos; y acumulación de madera y obstaculización de los cursos de agua.

Concluye que la reforestación indicada por la demandante es plenamente pertinente, toda vez que fue calculada sobre la base de la longitud del camino construido, multiplicado por su ancho promedio, de tal forma que corresponde efectivamente a la superficie que quedó sin cobertura vegetal. Considera, asimismo, que por las condiciones climáticas extremas y la necesidad de asegurar en el mediano plazo el restablecimiento del estado original del bosque, la densidad propuesta de 1.800 plantas por hectárea es técnicamente correcta.

Quinto: Que los demandados allegaron el Ordinario N° 286 de 12 de diciembre de 2003, emanado del Jefe Provincial Malleco, CONAF IX Región, cuyo destinatario es la Directora de Fronteras, que da cuenta de la solicitud de autorización presentada por Rubén Cayuqueo Torres, propietario del predio Hijuela N° 8 Icalma, que dice relación con petición de "Norma de Manejo Aplicable al Tipo Forestal Lenga" (Raleo de Renovales) a efectuar en el predio anteriormente mencionado.

A continuación, se lee: "En virtud a los antecedentes que acompañan a esta solicitud, informo a Ud., que la Corporación Nacional Forestal, atendiendo las exigencias establecidas en el DL. 701 de 1974, recomienda la autorización del presente Plan de Manejo para su tramitación por cuanto, la propuesta de manejo a realizar, contempla el uso racional de los recursos forestales involucrados".

Sexto: Que también rola informe pericial efectuado por Edison Torres Rebolledo, ingeniero forestal, llevándose a cabo el reconocimiento los días 12 y 20 de marzo de 2012.

Afirma el perito que durante su visita verificó las condiciones actuales de vegetación nativa de araucaria araucana y los efectos ambientales derivados de la construcción de un camino que permanece desde el año 2003.

Expone que la zona periciada fue utilizada en la construcción de un camino para extracción de productos madereros cuyas dimensiones promedio oscilan en los 6 metros de ancho y 2.000 metros de largo.

Enseguida describe los principales impactos que aún perduran, adjuntando las respectivas fotografías:

1.- Se mantiene la obstaculización de escorrentías naturales y siguen los procesos erosivos alcanzando a la fecha una pérdida de suelo de alrededor de 20 centímetros en la parte central del camino producto de la erosión hídrica y la ausencia de alcantarillas que permitan el libre flujo de agua.

2.- Continúan los procesos erosivos provocados por el arrastre de sedimentos que componen el suelo, principalmente materia orgánica.

3.- Continúa y aumenta cada día la pérdida de suelo producto de la acción erosiva del agua y además se observa la muerte de raíces que quedaron expuestas a la acción del sol y humedad propiciando su caída por efecto del viento.

4.- Continúa la acumulación de tierra al costado del camino y ausencia de talud, alterando las condiciones naturales del suelo necesarias para el establecimiento de especies arbóreas y la regeneración natural de araucaria araucana.

5.- Continúa la acumulación de madera y obstaculización de cursos de agua producto de la construcción del camino.

6.- Se observa aún en terreno la destrucción y volteo hacia un costado del camino de árboles adultos de araucaria araucana, daño provocado por la maquinaria pesada tras sacar material orgánico en la construcción del camino.

7.- Se observa la corta de árboles adultos de araucaria araucana a un costado del camino, producto del despeje de la zona para la construcción del camino con maquinaria pesada.

8.- Se mantiene el daño y corte de raíces principales en árboles adultos de araucaria araucana para permitir el paso de la maquinaria pesada en la construcción del camino. Este daño se caracteriza por el corte biselado que se le realizan a raíces de mayor diámetro, técnica que facilita el corte de éstas.

9.- Se mantiene la superficie del camino sin cobertura vegetal, aun cuando éste ya no tenga uso productivo. Es decir, a la fecha el suelo desnudo no ha tenido la resistencia para recuperarse y permitir el desarrollo de la regeneración natural dado los impactos negativos provocados en la construcción del camino.

Séptimo: Que el artículo único de la Ley N° 20.473 de 13 de noviembre de 2010 (ex artículo 62 de la Ley N° 19.300), dispone: "El juez apreciará la prueba conforme a las reglas de la sana crítica y será admisible cualquier medio de prueba, además de los establecidos en el Código de Procedimiento Civil".

La sana crítica, en cuanto está referida a la valoración y ponderación de la prueba, determina su contenido, además de las razones jurídicas pertinentes, por las reglas de la lógica, la experiencia y los conocimientos científicamente afianzados. Estos aspectos no pueden ser desatendidos por el juez en la apreciación tanto de los medios probatorios considerados aisladamente como en su valoración conjunta, para así extraer las conclusiones pertinentes en cuanto a los hechos y fijar la forma en que ellos sucedieron.

Octavo: Que el mérito de las evidencias probatorias reseñadas en los motivos cuarto, quinto y sexto, analizadas bajo los parámetros antes anotados, permiten inferir los siguientes hechos:

1.- Que en la Hijuera N° 8 de la comunidad indígena Pedro Calfuqueo, comuna de Lonquimay, se detectó en el mes de febrero de 2003 una corta no autorizada (sin plan de manejo) de las especies araucaria araucana y lenga para la construcción de un camino de aproximadamente 2 kilómetros de largo y 6 metros de ancho, a cargo de los demandados. La superficie de 1,2 hectáreas corresponde a un bosque de vegetación nativa, en terrenos de elevada pendiente, afectándose no sólo el valor paisajístico del lugar, sino los recursos suelo, cursos de agua, flora y fauna.

2.- Se constataron, en efecto, daños ambientales diversos originados en el trazado de un camino llevado a cabo con maquinaria pesada y motosierras sin ninguna clase de resguardo de las especies forestales antes indicadas y sin respaldo técnico de los otros recursos naturales involucrados. Se comprobó: a) la destrucción de ejemplares adultos de araucaria, sea por el derribamiento de éstos como por el cercenamiento de raíces principales de otros ejemplares adultos, lo cual ha afectado significativamente su estabilidad, vigor biológico y sobrevivencia. También se acreditó la exposición de las raíces de los árboles adultos a los efectos secantes del sol y del aire, afectando el vigor de esas especies y su estabilidad. b) la destrucción de regeneración de araucaria al verse aplastada por árboles volteados, alterando el sustrato natural de regeneración de la vegetación, esto es, la denominada "cama de semillas", retrasando el proceso de establecimiento de las especies arbóreas. c) la remoción de tierra alterando las condiciones del suelo, el arrastre y acumulación de material sedimentario hacia las partes bajas. Como resultado del arrastre de sedimentos, en la parte baja se acumuló gran cantidad de material fino que fluyó paulatinamente hacia los cursos de agua. Además se produjo la disminución de la calidad nutritiva del suelo desde donde provinieron los sedimentos que lo componen, principalmente materia orgánica. d) Obstaculización

de escorrentías naturales y procesos erosivos producto de la acción del agua al impedírsele su libre flujo mediante la acumulación de residuos de la explotación.

3.- Que CONAF recomendó la autorización de un Plan de Manejo forestal para la Higuera N° 8 sólo recién con fecha 12 de diciembre de 2003, esto es, diez meses después de inspeccionados los daños que se han descrito.

Noveno: Que el artículo 2° de la citada Ley N° 19.300 describe el daño ambiental como "Toda pérdida, disminución, detrimento o menoscabo significativo inferido al medio ambiente o a uno o más de sus componentes".

Los pilares de este último cuerpo normativo se sustentan en el derecho a vivir en un medio ambiente libre de contaminación, regulando la protección del medio ambiente, enfrentando la preservación de la naturaleza y la conservación del patrimonio ambiental. A su vez, al "Medio Ambiente" lo define como "El sistema global constituido por elementos naturales y artificiales de naturaleza física, química o biológica, socioculturales y sus interacciones, en permanente modificación por la acción humana o natural y que rige y condiciona la existencia y desarrollo de la vida en sus múltiples manifestaciones".

Dentro de los conceptos de "protección del medio ambiente" y "preservación de la naturaleza", la legislación incluye las acciones destinadas a asegurar la mantención de las condiciones que hacen posible la evolución y el desarrollo de las especies y de los ecosistemas del país.

La acción de "reparación" concierne a "reponer el medio ambiente o uno o más de sus componentes a una calidad similar a la que tenían con anterioridad al daño causado o, en caso de no ser ello posible, restablecer sus propiedades básicas".

Décimo: Que, asimismo, de la definición legal de daño ambiental cabe destacar el requerimiento de ser éste significativo. Al efecto cabe recordar lo dicho por el jurista Rafael Valenzuela: "La exigencia de que los efectos sobre el medio ambiente tengan carácter significativo restringe el ámbito del daño ambiental. La palabra significativo conlleva la idea de una cierta valoración negativa mínima para el medio ambiente, de tal manera que los daños cuya entidad se encuentren por debajo de ese minimum no constituyen daño ambiental, aunque comparten un cierto grado de pérdida, disminución, detrimento o menoscabo para el medio ambiente o para uno o más de sus componentes. Debido, por otra parte, a que la ley no contiene parámetros que permitan una calibración objetiva de la significación de los daños inflingidos al medio ambiente, esta determinación queda entregada en definitiva a lo que resuelvan al respecto los jueces del fondo, con el margen de subjetivismo y de imprevisibilidad que ello conlleva". (Rafael Valenzuela Fuenzalida, "El Derecho Ambiental, presente y pasado", Editorial Jurídica de Chile, 2010, pág. 318).

Undécimo: Que la responsabilidad por daño ambiental instituida en nuestro ordenamiento jurídico persigue que los responsables reparen a sus víctimas de todo

daño, obligándolos especialmente a restaurar el paisaje deteriorado. La Ley N° 19.300 establece un sistema de responsabilidad subjetivo, pues preceptúa que "Todo el que culposa o dolosamente cause daño ambiental responderá del mismo en conformidad a la presente ley" (artículo 51 inciso 1°).

Duodécimo: Que, a su vez, con el objeto de mitigar el sistema subjetivo de responsabilidad, se contemplan presunciones legales de la misma, disponiéndose al efecto: "Se presume legalmente la responsabilidad del autor del daño ambiental, si existe infracción a las normas de calidad ambiental, a las normas de emisiones, a los planes de prevención o de descontaminación, a las regulaciones especiales para los casos de emergencia ambiental o a las normas sobre protección, preservación o conservación ambientales, establecidas en la presente ley o en otras disposiciones legales o reglamentarias" (inciso 1°, artículo 52).

La intervención del legislador en estos términos tiende a robustecer el sistema y la eficacia de las acciones que se interpongan para reclamar, puesto que la transgresión a tales normativas sólo puede constituir una acción voluntaria y por la que se asumen las consecuencias perjudiciales a terceros.

Décimo tercero: Que, como se dijo, en estos autos se encuentra acreditado que los demandados realizaron un trazado de camino provocando los daños antes descritos en un bosque nativo de araucarias y lengas, infringiendo la siguiente la normativa ambiental vigente:

-el Decreto Supremo N° 43 de 1990 del Ministerio de Agricultura, que señala en su artículo primero: "Declárese monumento natural de acuerdo a la definición y al espíritu de la „Convención para la protección de la Flora, Fauna y Bellezas Escénicas Naturales de América?, a la especie vegetal, de carácter forestal denominado Pehuén o Pino Chileno y cuyo nombre científico corresponde al de Araucaria Araucana".

En virtud del artículo 2° de este mismo texto sólo se permite la corta de araucarias vivas con fines científicos, para realizar obras públicas u obras de defensa nacional o cuando sean consecuencia de planes de manejo forestal por parte de organismos fiscales del Estado y cuyo exclusivo objeto sea el de mejorar y conservar la especie, todo debidamente autorizado previamente por el Director Ejecutivo de la Corporación Nacional Forestal.

Es claro, entonces, que los demandados vulneraron la prohibición contenida en esta norma al talar numerosos ejemplares de araucarias con propósitos distintos a los indicados y sin autorización de las autoridades.

-el Decreto Ley N° 701 sobre Fomento Forestal, cuyo artículo 21 inciso primero ordena que "cualquier acción de corta o explotación de bosque nativo deberá hacerse previo plan de manejo aprobado por la Corporación (Nacional Forestal".

En este caso, los demandados procedieron a cortar una gran cantidad de lengas sin la habilitación que otorga el respectivo Plan de Manejo, del cual carecían a la época de intervenir la Hijueta N° 8.

Décimo cuarto: Que constatadas las infracciones legales anotadas y no desvirtuadas, se configura la referida presunción de responsabilidad contemplada en el artículo 52 de la Ley N° 19.300, presunción legal que descansa en la culpabilidad del ejecutor de la acción que se reprocha. Efectivamente, la infracción a una regulación legal que causa un daño indemnizable es tenida, en principio, por culpable y da lugar a responsabilidad civil de acuerdo a las reglas generales. El criterio de culpa infraccional está expresamente recogido por la Ley de Bases del Medio Ambiente, en cuya virtud se presume responsabilidad, esto es, culpabilidad del autor del daño ambiental si existe infracción a las normas de emisiones, a planes de prevención o conservación generales, establecidas en ese mismo cuerpo normativo o en otras disposiciones legales o reglamentarias.

En la especie, si los demandados hubieran cumplido las exigencias de las normas ambientales citadas en el considerando anterior, adoptando las medidas de resguardo y protección del medio ambiente que ellas ordenaban, se habrían evitado los daños al medio ambiente que se acusan.

Décimo quinto: Que la calificación de daño ambiental significativo queda demostrada por tratarse de una corta ilegal de araucarias, especie declarada monumento natural, además del menoscabo que se generó al suelo y otros recursos forestales en un bosque de más de 150 años de antigüedad de gran belleza escénica.

Décimo sexto: Que, por consiguiente, ha de acogerse la pretensión del demandante en cuanto se dirige a la reparación ambiental, ordenándose en la parte resolutive de la sentencia las medidas que se estiman pertinentes.

Por estas consideraciones y lo dispuesto en la Ley N° 19.300 y artículos 197 y siguientes del Código de Procedimiento Civil, se revoca la sentencia apelada de treinta y uno de mayo de dos mil doce, escrita a fojas 341, en cuanto rechaza la demanda de reparación por daño ambiental y, en su lugar, se resuelve que se acoge la acción ambiental deducida por el Consejo de Defensa del Estado en representación del Fisco de Chile, sólo en cuanto se declara que los demandados, Julio García Brocal y la sociedad J.G.B. S.A., quedan obligados a implementar las siguientes medidas: a) Limpiar la zona afectada de la Hijueta N° 8, de la comunidad indígena Pedro Calfuqueo, mediante el retiro de los árboles volteados, restos vegetales y tierra, lo cual está retrasando el crecimiento de nuevas especies arbóreas y entorpeciendo el libre escurrimiento de las aguas. b) Reforestar el área directamente afectada con araucaria araucana y lenga -*Nothofagus Pumilio*- en una densidad de 1.800 plantas por hectárea. Estas especies deberán provenir de viveros autorizados por la Corporación Nacional Forestal, para el restablecimiento de las condiciones originales del bosque. c) Proteger las raíces y estabilidad de los árboles que se encontraban en los alrededores del área directamente afectada. d) Ejecutar

todas las obras necesarias, bajo la supervisión de la autoridad ambiental, para restaurar los daños que se han seguido produciendo a fin de lograr la reparación integral del medio ambiente dañado, elaborando los estudios necesarios para ejecutar todas las medidas señaladas.

Acordada con el voto en contra del Abogado Integrante señor Pfeffer, quien estuvo por confirmar la sentencia en alzada en virtud de sus propios fundamentos.
Regístrese y devuélvase con sus agregados.

Redacción a cargo del Abogado Integrante señor Baraona y de la disidencia, su autor.

Rol N° 4033.2013.

Pronunciado por la Tercera Sala de esta Corte Suprema integrada por los Ministros Sr. Sergio Muñoz G., Sr. Héctor Carreño S., Sr. Ricardo Blanco H. y los abogados integrantes Sr. Jorge Baraona G. y Sr. Emilio Pfeffer U. No firma, no obstante haber concurrido a la vista y al acuerdo de la causa, el Ministro señor Muñoz por estar con feriado legal. Santiago, 03 de octubre de 2013.

Autoriza la Ministra de Fe de la Excma. Corte Suprema.

En Santiago, a tres de octubre de dos mil trece, notifiqué en Secretaría por el Estado Diario la resolución precedente.

Conclusion

Jurists play an essential role in analyzing and contextualizing environmental constitutionalism's emerging influence. This corresponds with a worldwide growth in independent judiciaries, or at least courts that have jurisdiction to hear constitutional questions and advance new constitutional rights and remedies. With more courts engaging in constitutional review, and issuing more opinions, the import of comparative constitutionalism grows. For instance, while Israel, South Africa, and Colombia have radically different histories, each has constitutional courts addressing the multivariate challenges of balancing public and private power, of interpreting entrenched constitutional texts, and of maintaining institutional legitimacy while ensuring, the progressive development of rights.

As the societies around the world evolve at an ever-faster rate, courts are increasingly faced with problems of first impression, problems that are answerable less by recourse to each country's own history and constitutional origins than to contemporary experience and reason. A single nation's own past practice is unlikely to guide a court's judgment with regard to diminishing privacy, or the threat of terrorism, or, especially to the challenges of environmental degradation and climate change.

These challenges must be answered by reference to the best practices among nations. Comparing and contrasting among jurists "expands judicial thinking" and reveals "false necessities." Nowadays, it is widely accepted that comparative constitutionalism contributes to the development of a body of best practices. Nonetheless, judges should not feel bound by approach or the outcome in a foreign case because the constitutional court's obligation is, of course, to interpret and apply its nation's own constitution. And judges should be especially cautious to avoid misreading or failing to contextualize decisions of a peer court. But most courts intuitively avoid this mistake and require little guidance. Moreover, we note here that the task of the jurist differs fundamentally from the task of those who seek to comment on, understand, and elucidate judicial opinions. Because the law takes into account judicial reasoning, it is important to know what sources influenced or inspired the judge; whether she borrowed from foreign or international sources or relied exclusively on domestic experience determines how the opinion is interpreted and applied in later cases and affects its expressive significance. It is, for that reason, especially important for the court to understand the nature and the character of the foreign or international source. The borrowing jurist must pay particular attention to the reasoning of the foreign opinion to ensure that she is appropriating it fairly and accurately. By contrast, when scholars survey global jurisprudence, the very fact that a judicial opinion has construed a constitutional environmental provision or applied it in a particular way is itself worthy of note, whether or not the reasoning is particularly persuasive.

While comparative constitutionalism is a legitimate means for evaluating the emergence of global environmental constitutionalism, it is not without its limitations.

First, because the jurisprudence is global, describing and respecting the integrity of localization can be challenging. Throughout the book, we examine in detail the arguments that favor and disfavor adjudication of environmental claims in domestic constitutional fora; we suggest at this juncture simply that national courts are better suited to implement the norms that have been articulated at the international level, given their ability to translate those universal values into the local vernaculars and to do so with authority and impact. National courts offer each country the opportunity to determine for itself the appropriate balance of development and sustainability, the ways in which the nation will mitigate or adapt to climate change, the means it will use to protect the environment for the benefit of mankind or for nature itself, and the particular ways it will balance the often competing needs of present and future generations. Although most countries adhere to international declarations and conventions affirming their commitment to environmental protection, one country might do so by treating environmental protection as a public good, while another might prefer to use the revenues produced from private exploitation of natural resources for education or social security. These are complex policy choices that are best made at the national level by institutions that are operating within the local society, familiar with local conditions, and accountable within the local political climate. And courts, more than the tribunals and commissions that operate regionally and internationally, are more accessible to the local population and more able to effectively enforce their orders against local officials.

Localization of environmental protection is particularly important for several additional reasons, too. It is undoubtedly true that although some environmental problems transcend national borders, most are rooted in local spaces, whether a bay, a forest, or a particular part of a mountaintop. And the manifestations of environmental degradation are experienced by the local residents, as loss of access to nature, deterioration of health, and so on. Likewise, the solutions are most likely to be implemented locally. Responsibility for the choices made must be taken by actors who are politically accountable.

The ability to implement environmental values in a local context also helps to avoid some of the most contentious charges made against international environmental law, namely those embodied in claims of western hegemony and cultural imperialism. Judiciaries in countries that resist the global environmental ethos can move more slowly or not at all, while others can push the boundaries of international law into new and uncharted territories, as, for instance, Ecuador and Bolivia have done in protecting the rights of nature, and as many countries have done in explicitly encouraging environmental rights litigation and in tying environmental protection to the protection of life and human dignity.

But while the situs of environmental issues are ordinarily contextually specific, their implications are transcendent, involving almost all aspects of life. National courts, like international summits, have recognized that pollution can affect individual and social health: lack of water can diminish girls' opportunities to attend school; climate change can produce environmental refugees; irresponsible exploitation of natural resources can devastate entire cultures; and, as the water wars of the 1990s in

Bolivia suggest, failure to balance environmental and human needs can even threaten rule of law and democratic governance.

The challenges inherent in any comparative approach have particular salience with regard to emerging and what can be evanescent ideals like environmental protection. For example, because the legal boundaries of environmental protection are often not well defined, courts engaging constitutional claims may find themselves not only defining the scope of legally enforceable rights but also propounding social values. Values, more than rights, may inform public discourse and infiltrate social consciousness that, in turn, can help to change the behavior of both public and private actors. A court that persistently emphasizes the importance of sustainability and of maintaining a balance with nature will help to inculcate environmental values into the culture: people will demand that public officials act in ways that respect nature, and will do so not only through litigation but in all forms of political discourse and even private activity. As a result, judicial articulation of environmental values may be as instrumental in promoting environmental protection as the legal pronouncements on the scope of the rights asserted.

Comparing the constitutional environmental jurisprudence of countries around the world yields insights into the ways different legal cultures have responded to similar problems. The panoply of cases included in these materials illustrates the profound commitment to environmental protection that some courts have shown, and the inexhaustible creativity that they have evidenced in trying to resolve complex, polycentric problems that implicate these diverse interests. Through the comparative project, we can see how, by borrowing and learning from one another, courts are developing a rich and varied set of responses to the challenges of environmental protection through the means of environmental constitutionalism.

We emphasize decisions issued by apex or constitutional courts in certain countries; with few exceptions, we have not analyzed decisions by lower courts in most countries, nor to green courts or other specialized tribunals because these decisions are less accessible in a medium that can be cite-verified, they are subject to subsequent revision by apex courts, and they are less likely to have a social impact that is as profound. And because we are most interested in the *constitutional* dimensions of domestic environmental rights, we have not generally considered decisions involving common or civil law environmental issues, nor on the decisions of regional bodies, such as the African Commission on Human and People's Rights, the Inter-American Commission on Human Rights, or the European Court of Human Rights, except to the extent they engage environmental constitutionalism.

Other limitations of comparative constitutionalism are epistemic. Most constitutions lack a constitutional record that might help to explain what the framers of a provision had in mind. Only rarely does one gain a glimpse into the machinations of constitutional reform.

Moreover, a constant of environmental constitutionalism is how quickly it changes. Indeed, in the last decade alone, more than a dozen countries have adopted or

substantially modified substantive environmental rights provisions in their constitutions, including Armenia, Bolivia, Ecuador, Egypt, Dominican Republic, Fiji, France, Guinea, Hungary, Jamaica, Kenya, Maldives, Madagascar, Montenegro, Morocco, Myanmar, Nepal, Rwanda, Serbia, South Sudan, Sri Lanka, Sudan, Tunisia and Turkmenistan. And with a 17-year shelf life for the average constitution, environmental constitutionalism is a moving target.

While these materials detail what jurists decide, within do not presume to explicate what each judicial decision can mean in a particular political and cultural context or the social implications of each case, nor whether or not a particular case has resonated throughout society or become an icon of the potential for judicial engagement (for good or ill). Nor as a general matter do we presume to analyze the political ramifications and sequelae of each case: how was it received? Was it implemented? Has the river or forest or mountaintop returned to a pristine state? Because of the fragility of the environment and the enormous forces that militate against protection (development, population growth, conflict, culture, corruption or greed, and so on), it is likely that the environmental interest that is protected in a given case may not remain protected for long. Depending on location, circumstances, timing and other factors, a judicial pronouncement can contain powerful, showy but unenforceable prose that ultimately advances the human condition in unremarkable ways, if at all. On the other hand, some judicial opinions that appear to advance justice only parochially or incrementally can ultimately harbor emerging rights for present and future generations.

In fact, courts can hardly on their own cause wholesale transformation of domestic environmental policy. In most countries, constitutional and apex courts have spoken seldom if at all about environmental constitutionalism. And yet, it is our contention that even these sporadic assertions are important because they are indicative of a growing worldwide awareness of the potential of environmental constitutionalism. The mere fact that courts are focusing on the constitutional dimensions of environmental issues makes it more likely that environmental awareness will seep into the cultural consciousness here and now for the living, and there and then for generations to come.

[End]

Appendix: Sample Provisions of Environmental Constitutionalism

Substantive Environmental Rights

Argentina

Part I, Chapter 2, Article 41: "All residents enjoy the right to a healthy, balanced environment which is fit for human development and by which productive activities satisfy current necessities without compromising those of future generations .. ."

Belarus

Section 2, Article 46: "Everyone is entitled to a wholesome environment and to compensation for loss or damage caused by violation of this right."

Belgium

Title II, Article 23(4): "Everyone has the right to lead a life worthy of human dignity ... [including] the right to enjoy the protection of a healthy environment."

Brazil

Title VII, Chapter VI, Article 225: "All persons are entitled to an ecologically balanced environment, which is an asset for the people's common use and is essential to a healthy life"

Bolivia

Article 33: "Everyone has the right to a healthy, protected, and balanced environment. The exercise of this right must be granted to individuals and collectives of present and future generations, as well as to other living things, so they may develop in a normal and permanent way."

Cameroon

Preamble: "[E]very person shall have a right to a healthy environment."
Part 12, Article 65: "The Preamble shall be part and parcel of this Constitution."

Chile

Chapter 3, Article 19(8): "All have 'The right to live in an environment free from contamination.'"

Congo-Brazzaville

Title II, Article 35: "Each citizen shall have the right to a healthy, satisfactory, and sustainable environment and the duty to defend it. The State shall strive for the protection and the conservation of the environment."

East Timor

Part II, Title III, Article 61(1): "All have the right to a humane, healthy, and ecologically balanced environment and the duty to protect it and improve it for the benefit of the future generations."

Egypt

Article 69: "All individuals have the right to a healthy environment."

Indonesia

Section 10A, Article 28H(1): "Each person has a right to a life of well-being in body and mind, to a place to dwell, to enjoy a good and healthy environment, and to receive medical care."

Kenya

Chapter 42: "Every person has the right to a clean and healthy environment, which includes the right – (a) to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and (b) to have obligations relating to the environment fulfilled under Article 70" (allowing any person to apply to a court for redress of damage to the environment).

Mali

Title I, Article 15: "Every person has the right to a healthy environment."

Morocco

Article 31: "The State, the public establishments and the territorial collectivities work for the mobilization of all the means available to facilitate the equal access of the [citizens] to conditions that permit their enjoyment of the right ... to the access to water and to a healthy environment."

Mozambique

Part II, Chapter 1, Article 72: "All citizens shall have the right to live in ... a balanced natural environment."

Norway

Section E, Article 110b: “Every person has a right to an environment that is conducive to health and to natural surroundings whose productivity and diversity are preserved.”

Paraguay

Part I, Title II, Chapter 1, Section 2, Article 7: “Everyone has the right to live in a healthy, ecologically balanced environment.”

Russian Federation

Chapter 2, Article 42: “Everyone shall have the right to a favorable environment, reliable information about its condition, and to compensation for the damage caused to his or her health or property by ecological violations.”

Rwanda

Article 49: “Every person has a right to a clean and healthy environment.”

Senegal

Title II, Article 8: “The government of Senegal guarantees to all citizens the fundamental individual liberties, economic and social rights, as well as collective rights. These liberties and rights include ... the right to a healthy environment.”

Seychelles

Chapter 3, Part I, Article 38: “The State recognises the right of every person to live in and enjoy a clean, healthy and ecologically balanced environment ...”

South Africa

Section 24: Everyone has the right (a) to an environment that is not harmful to their health or well-being; and (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that –

1. (i) prevent pollution and ecological degradation,
2. (ii) promote conservation; and
3. (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

South Sudan

Article 41(1): “Every person or community shall have the right to a clean and healthy environment.”

Article 41(3): "Every person shall have the right to have the environment protected for the benefit of present and future generations, through appropriate legislative action and other measures that: (a) prevent pollution and ecological degradation; (b) promote conservation; and (c) secure ecologically sustainable development and use of natural resources while promoting rational economic and social development so as to protect genetic stability and bio-diversity."

Spain

Title I, Chapter 3, Article 45(1): "Everyone has the right to enjoy an environment suitable for the development of the person .."

Sudan

Chapter 11(1): "The people of the Sudan shall have the right to a clean and diverse environment."

Ukraine

Chapter 2, Article 50: "Everyone has the right to an environment that is safe for life and health, and to compensation for damages inflicted through the violation of this right."

Venezuela

Title III, Chapter 9, Article 127: "Every person has a right to individually and collectively enjoy a life and a safe, healthy and ecologically balanced environment."

Procedural Environmental Rights

Eritrea

Chapter 2, Article 8(2): "The State shall work to bring about a balanced and sustainable development throughout the country, and shall use all available means to enable all citizens to improve their livelihood in a sustainable manner, through their participation."

Ethiopia

Chapter 10, Article 92(3): "People have the right to full consultation and to the expression of views in the planning and implementations of environmental policies and projects that affect them directly."

Finland

Chapter 2, Section 20: "The public authorities shall endeavor to guarantee ... for everyone the possibility to influence the decisions that concern their own living environment."

France

Charter of the Environment, Article 7: “Everyone has the right, subject to the conditions and within the limits defined by the law, to have access to the information relating to the environment held by the public authorities.”

Georgia

Chapter 2, Article 37(5): “A person shall have the right to receive complete, objective and timely information on the state of his or her working and living environment.”

Kazakhstan

Section II, Article 31(2): “Officials are held accountable ... for the concealment of facts and circumstances endangering the life and health of the people.”

Montenegro

Article 23: “Everyone shall have the right to a sound environment. Everyone shall have the right to receive timely and full information about the status of the environment, to influence the decision-making regarding the issues of importance for the environment, and to legal protection of these rights.”

Mozambique

Article 81: “1. All citizens shall have the right to popular action in accordance with the law, either personally or through associations for defending the interests in question. 2. The right of popular action shall consist of: (a) the right to claim for the injured party or parties such compensation as they are entitled to; (b) The right to advocate the prevention, termination or judicial prosecution of offences against the public health, consumer rights, environmental conservation and cultural heritage.”

Paraguay

Part I, Title II, Chapter 1, Section 2, Article 8: “A law will define and establish sanctions for ecological crimes. Any damage to the environment will entail an obligation to restore and to pay for damages.”

Zambia

Section 302: “(o) the people shall have access to environmental information to enable them to preserve, protect and conserve the environment.”

Sustainability, Public Trust, Climate and Nature

Bolivia

Title II, Chapter 1, Article 342: "It is the duty of the State and the population to conserve, protect and use natural resources and the biodiversity in a sustainable manner, as well as to maintain the equilibrium of the environment." Article 346: "The natural assets are of public importance and of strategic character for the sustainable development of the country."

Brazil

Chapter 6, Article 225: "Everyone has a right to an ecologically balanced environment, which is a public good for the people's use and is essential for a healthy life. The Government and the community have a duty to defend and preserve the environment for present and future generations."

Dominican Republic

Chapter 4, Article 17; Chapter 6, Article 67; Title IX, Chapter 1, Article 194: "The formulation and execution, through the law, of a plan of territorial ordering that assures the efficient and sustainable use of the natural resources of the Nation, in accordance with the need of adaptation to climate change, is [a] priority of the State."

Ecuador

Article 71 and Articles 72–4: "Nature, or Pachamama, where life is reproduced and created, has the right to integral respect for her existence, her maintenance, and for the regeneration of her vital cycles, structure, functions, and evolutionary processes."

Eritrea

Chapter 2, Article 8(2): "The State shall work to bring about a balanced and sustainable development throughout the country, and shall use all available means to enable all citizens to improve their livelihood in a sustainable manner, through their participation."
Chapter 2, Article 8(3): "[T]he State shall be responsible for managing all land, water, air and natural resources and for ensuring their management in a balanced and sustainable manner."

Ghana

Chapter 21, Article 211(1): "All public lands in Ghana shall be vested in the President, on behalf of, and in trust for, the people of Ghana."
Article 213: "Every mineral in its natural state in, under or upon any land in Ghana, rivers, streams, watercourses throughout Ghana, the exclusive economic zone and any area covered by the territorial sea or continental shelf is the property of the Republic of Ghana and shall be vested in the President, on behalf of, and in trust for, the people of Ghana."

Luxembourg

Article 11.2: “The State guarantees the protection of the human and natural environment, working to establish a sustainable balance between nature conservation, especially its capacity for renewal, and satisfying the needs of present and future generations ... It promotes the protection and welfare of animals.”

Namibia

Chapter 11, Article 95(l): “The State shall actively promote and maintain the welfare of the people by adopting, inter alia, policies aimed at ... maintenance of ecosystems, essential ecological processes and biological diversity of Namibia and utilization of living natural resources on a sustainable basis for the benefit of all Namibians, both present and future.

Nepal

Part IV, Section 35(5): “Provision shall be made for the protection of the forest, vegetation and biodiversity, its sustainable use and for equitable distribution of the benefit derived from it.”

Niger

Section 2, Article 149: “The exploitation and the administration of the natural resources and of the subsoil must be done with transparency and taking into account the protection of the environment, [and] the cultural heritage as well as the preservation of the interests of present and future generations.”

Nigeria

Part II, Article 20: “The State shall protect and improve the environment and safeguard the water, air and land, forest and wild life of Nigeria.”

Switzerland

Section 4, Article 73: “Sustainable Development. The Confederation and the Cantons shall endeavor to achieve a balanced and sustainable relationship between nature and its capacity to renew itself and the demands placed on it by the population.”

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