



INTERPRETATION OF THE RIGHT TO A HEALTHY ENVIRONMENT IN THE CONSTITUTION OF JAMAICA

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INTERPRETATION OF THE TERMS IN ARTICLE 13(3)(I), CHARTER OF RIGHTS

Article 13(3) of the Charter of Fundamental Rights and Freedoms, guarantees to all persons in Jamaica:

(I) the right to enjoy a healthy and productive environment free from the threat of injury or damage from environmental abuse and degradation of the ecological heritage

Article 13(3)(I) has not yet been judicially interpreted. However, consideration of how courts have interpreted similar terms in other constitutions and international instruments may be useful in defining the scope of article 13(3)(I).

❖ “ENJOY A HEALTHY AND PRODUCTIVE ENVIRONMENT”

A “healthy environment” has been defined as:

[A]n environment sufficiently free of human intervention to maintain its essential natural processes; it means an environment that can sustain its own biodiversity; and, because it is a human right, it must also mean an environment that can sustain human life...an environment that is itself healthy...¹

It has also been noted that the right to a “healthy environment”:

... Involves many things including clean water, air and soil that are free from toxins, wastes or hazards that threaten human health

... As with every human right, the right to a clean and healthy environment entails the obligations to respect, protect and fulfil. ***The obligation to respect requires the state to refrain from interfering directly or indirectly with the enjoyment of the right. The obligation to protect requires the state to prevent third parties such as corporations, from interfering in any way with the enjoyment of the right. The obligation to fulfil requires the state to***

¹ Neil A.F. Popovich, ‘In Pursuit of Environmental Human Rights: Commentary on the Draft Declaration of Principles on Human Rights and the Environment’, (1996) 27 Colum. Human Rights L. Rev. 487, 504, 524.

***adopt necessary legislative, administrative and judicial measures to achieve realisation of the right.*²**

In *Oposa et al v Fulgencio S. Factoran, Jr. et al*³, the Supreme Court of the Philippines considered the scope of the constitutional right to a “healthful ecology”. Feliciano J stated that environmental health is “entirely open-ended”, and includes:

...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.

In *Social Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights v Nigeria*⁴, the petitioners alleged that the Nigerian government (through the State oil company and in its role as the majority shareholder in an oil consortium) caused environmental degradation and health problems through the disposing of toxic waste into the soil, air and local waterways which harmed the health of the Ogoni people. It was alleged that the government did not monitor the operations and safety measures of these companies or require the companies or state agencies to produce health and environmental impact studies. Additionally, the government withheld information on the dangers created by the oil activities from Ogoni communities, and refused to involve them in decisions affecting the development of their land.

The petitioners alleged breaches of, inter alia, Articles 16 and 24 of the African Charter on Human and Peoples’ Rights, which guarantee to every individual “the

² Ben Kiromba Twinomugisha, ‘Some Reflections on Judicial Protection of the Right to a Clean and Healthy Environment in Uganda’, (2007) 3/3 Law, Environment and Development Journal’, 244, 248 - 249 (available at <http://www.lead-journal.org/content/07244.pdf>).

³ *Juan Antonio Oposa et al v The Honorable Fulgencio S. Factoran, Jr., in his capacity as the Secretary of the Department of Environment and Natural Resources, and the Honorable Eriberto U. Rosario, Presiding Judge of the RTC, Makati, Branch 66, respondents* [G.R. No. 101083. July 30, 1993] (available at http://www.lawphil.net/judjuris/juri1993/jul1993/gr_101083_1993.html).

⁴ African Court on Human and Peoples’ Rights, Communication No. 155/96 (available at <http://www.cesr.org/downloads/AfricanCommissionDecision.pdf>).

right to enjoy the best attainable state of physical and mental health” and “the right to a general satisfactory environment favourable to their development”, respectively.

In finding the government liable for a violation of the right to health and a clean environment under the African Charter, the African Commission on Human and Peoples’ Rights held:

[51] These rights recognise the importance of a clean and safe environment that is closely linked to economic and social rights in so far as the environment affects the quality of life and safety of the individual. As has been rightly observed by Alexander Kiss, “***an environment degraded by pollution and defaced by the destruction of all beauty and variety is as contrary to satisfactory living conditions and the development as the breakdown of the fundamental ecologic equilibria is harmful to physical and moral health.***”

[52] The right to a general satisfactory environment, as guaranteed under Article 24 of the African Charter or ***the right to a healthy environment, as it is widely known, therefore imposes clear obligations upon a government. It requires the State to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources.*** Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), to which Nigeria is a party, requires governments to take necessary steps for the improvement of all aspects of environmental and industrial hygiene. The right to enjoy the best attainable state of physical and mental health enunciated in Article 16(1) of the African Charter and the right to a general satisfactory environment favourable to development (Article 16(3)) already noted ***obligate governments to desist from directly threatening the health and environment of their citizens. The State is under an obligation to respect the just noted rights and this entails largely non-interventionist conduct from the State for example, not from carrying out, sponsoring or tolerating any practice, policy or legal measures violating the integrity of the individual.***

[52]Government compliance with the spirit of Articles 16 and 24 of the African Charter ***must also include ordering or at least permitting independent scientific monitoring of threatened environments, requiring and publicising environmental and social impact studies prior to any major industrial development, undertaking appropriate monitoring and providing information to those communities exposed to hazardous materials and activities and providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities.***

❖ “FREE FROM THE THREAT OF INJURY OR DAMAGE FROM”

The use of the word “threat” is in line with the right to apply for redress in respect of past, present and *potential* breaches of the right to a healthy environment under section 19(1), which provides:

19. (1) If any person alleges that any of the provisions of this Chapter *has been, is being or is likely to be contravened* in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress.

The *Judicial Handbook on Environmental Law* (prepared by the United Nations Environmental Program as a guide for judges on environmental issues arising in litigation)⁵ states:

Wherever possible, prevention of harm should be the court's primary objective, especially where there is a constitutional or legislative obligation to protect the environment. The principle of prevention will most likely necessitate injunctive relief where the threat of harm is imminent or harmful activity is on-going.

⁵ Dinah Shelton and Alexandre Kiss, *Judicial Handbook on Environmental Law*, (2005 United Nations Environmental Program). Page iii states: “*This handbook is intended to enable national judges in all types of tribunals in both civil law and common law jurisdictions to identify environmental issues coming before them and to be aware of the range of options available to them in interpreting and applying the law. It seeks to provide judges with a practical guide to basic environmental issues that are likely to arise in litigation. It includes information on international and comparative environmental law and references to relevant cases. Judges in each particular country will supplement this overview with more detailed information drawn from national experiences, laws and traditions.*”

Injunctive relief is a long-standing remedy that can abate pollution or other environmental harm...

In some instances, injunctions can be important to securing compliance with the law and requiring affirmative remediation of harmful environmental conditions.⁶

In *Fundepúblico v Mayor of Bugalagrande and Others*, a claim was presented seeking the prevention of actual and imminent damage to the public interest as a result of the operation of an asphalt plant in the town of Bugalagrande, Colombia.⁷ The First Superior Court of Tulua-Valle ruled in favour of the claimants, holding that the operation of the asphalt plant would pose a significant risk to the environment, and requiring the mayor of Bugalagrande to temporarily suspend the operation of the plant. The Court recognized that ‘it is evident that there is a threat to a fundamental right recognized in the national Constitution...which could be violated, causing irreparable harm to the community.’⁸

On appeal, the Constitutional Court of Colombia upheld the first instance decision, stating that ‘lack of compliance with a measure which guarantees or protects a right threatens such right’ and recognizing that there was ‘an evident connection between the right to enjoy a healthy environment and other constitutional rights, such as the rights to sanitation, to life, to work, and to the prevalence of the general interest.’⁹

⁶ Ibid 54.

⁷ *Fundepúblico v Mayor of Bugalagrande y otros*, Juzgado Primero superior, Interlocutorio # 032, Tulua, 19 Dec. 1991; commented on by UN Special Rapporteur Fatma Ksentini in *Review of Further Developments in Fields With Which The Sub-Commission Has Been Concerned Human Rights and The Environment, Second Progress Report*, UN Doc. E/CN.4/Sub.2/1993/7, [33]-[39] (available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G93/143/49/PDF/G9314349.pdf?OpenElement>).

The plaintiffs in *Fundepúblico* (representing two communities in Bugalagrande) presented an “acción de tutela” – a mechanism provided by Article 86 of the Constitution of Colombia, which allows a person to file a writ of protection before a judge (for himself or by another person acting in his name) for the immediate protection of their fundamental constitutional rights when that person fears these may be violated or threatened by any action or omission of any public authority. This is similar to the provisions of section 19(2) of the Constitution of Jamaica, which allows a public or civic organization to apply for redress on behalf of persons entitled to apply under section 19(1).

⁸ Ibid 25.

⁹ *Fundepúblico v Mayor of Bugalagrande y otros* Corte Constitucional, Sentencia Junio de 1992, Expediente T-101, 13.

Further protection from threat of injury or damage is provided in section 13(1)(b) of the Constitution of Jamaica, which states:

(b) ***all persons in Jamaica are entitled to preserve for themselves and future generations the fundamental rights and freedoms*** to which they are entitled by virtue of their inherent dignity as persons and as citizens of a free and democratic society;

Although written in the form of a preamble, section 13(1)(b) contemplates the theory of inter-generational equity, which ‘requires each generation to use and develop its natural and cultural heritage in such a manner that it can be passed on to future generations in no worse condition than it was received. Central to this idea is the need to conserve options for future use of resources, including their quality, and that of the natural environment.’¹⁰

The principle of inter-generational equity was employed in arguments before the Supreme Court of the Philippines in *Juan Antonio Oposa and others v The Honourable Fulgencio S. Factoran* to secure the right to a “balanced and healthful ecology” contained in Section 16 of the Constitution of the Philippines.¹¹

The petitioners were a group of Filipino minors who brought an action on their own behalf and on behalf of future generations against the then Secretary of the Department of Environment and Natural Resources to compel the Department to cancel all existing timber licensing agreements and not approve any new timber licensing agreements. They claimed that by permitting loggers to cut down trees in the remaining 4% of the country’s virgin rainforests, the Department was depriving the future generations of their right to inherit a healthy environment, as the country’s forest resources would be destroyed by the end of the decade or sooner.

In addressing the standing of the petitioners, the Supreme Court stated:

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***

¹⁰ Patricia Birnie and Alan Boyle, *International Law & the Environment*, (2nd edn, Oxford University Press 2002), 89.

¹¹ *Juan Antonio Oposa et al., v. The Honourable Fulgencio S. Factoran, Jr., in his capacity as the Secretary of the Department of Environment and Natural Resources, and the Honourable Eriberto U. Rosario, Presiding Judge of the RTC, Makati, Branch 66* [G.R. No. 101083. July 30, 1993] 33 ILM 173 (1994) (available at http://www.lawphil.net/judjuris/juri1993/jul1993/gr_101083_1993.html).

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 Court held that the right to a healthy environment was an inalienable natural and legal right, and that future generations had the right to inherit such an environment. Davide Jr. J noted:

...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.*

❖ “ENVIRONMENTAL ABUSE”

“Environmental abuse” is defined by one writer as:

[T]he deliberate effort to put environment into optimal use without the slightest consideration for the stress introduced onto the environmental system.¹²

A similar term, “environmental *damage*” is defined as:

[A] significant adverse effect on a biotic or abiotic conservation resource (i.e., a biotic or abiotic natural resource that is protected by conservational or environmental legislation) that has an impact on the value of the conservation resource, the conservation resource as an ecosystem component, or the sustainable use of the conservation resource.¹³

The definition of “environmental *harm*” in the Environmental Protection Act of Western Australia also illustrates some aspects of environmental abuse:¹⁴

3A—

environmental harm means direct or indirect —

(a) harm to the environment involving removal or destruction of, or damage to —

(i) native vegetation; or

(ii) the habitat of native vegetation or indigenous aquatic or terrestrial animals; or

(b) alteration of the environment to its detriment or degradation or potential detriment or degradation; or

(c) alteration of the environment to the detriment or potential detriment of an environmental value; or

(d) alteration of the environment of a prescribed kind;

material environmental harm means environmental harm that —

¹² H. I. Jimoh, ‘Environmental Abuse and Management Techniques in Nigeria’, Leading Issues in General Studies: Humanities and Social Sciences, University of Ilorin: General Studies Division 216, 217 (available at www.unilorin.edu.ng/publications/HIJ/Environmental%20abuse.doc).

¹³ Robert Brtz, Ulrich Heink, Ingo Kowarik, ‘Proposed Definition of Environmental Damage Illustrated by the Cases of Genetically Modified Crops and Invasive Species’, Conservation Biology Volume 24, Issue 3, pages 675–681, June 2010 (Abstract) (available at <http://onlinelibrary.wiley.com/doi/10.1111/j.1523-1739.2009.01385.x/abstract>)

¹⁴ Environmental Protection Act 1986 (available at http://www.austlii.edu.au/au/legis/wa/consol_act/epa1986295/)

- (a) is neither trivial nor negligible; or*
- (b) results in actual or potential loss, property damage or damage costs of an amount, or amounts in aggregate, exceeding the threshold amount;*

serious environmental harm means environmental harm that —

- (a) is irreversible, of a high impact or on a wide scale; or*
- (b) is significant or in an area of high conservation value or special significance*

❖ “DEGRADATION OF ECOLOGICAL HERITAGE”

Although there is no universal definition of “ecological heritage”, the ordinary meaning of the words can be employed to understand the concept. “Ecology” refers to the relationships between living organisms and their physical/natural environment; while “heritage” refers to the various valued attributes of Jamaica’s ecology, including its flora, fauna, mineral resources, mountains, rivers, beaches, cays and other geomorphologic features.

The definition of “natural heritage” in the UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage is useful:

Article 2

For the purposes of this Convention, ***the following shall be considered as “natural heritage”:***

natural features consisting of physical and biological formations or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view;

geological and physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation;

natural sites or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty.

Additionally, *The Judicial Handbook on Environmental Law* states that “natural heritage encompasses the biodiversity of both species and ecological communities, including animals, plants, fungi, and terrestrial and freshwater communities.”¹⁵

Jamaica’s “ecological heritage” is therefore its natural features, geological and physiographical formations and natural sites which are of outstanding value from a local, regional and international standpoint, and ought to be sustained for the present and future generations.

In his article *Law for the Ecological Age*, Joseph Guth discusses the meaning of “ecological degradation”:

By “ecological degradation,” I mean to refer to the concepts used by scientists when they describe the decline of the Earth’s biosphere. For example, Noss et al. have described the ongoing biotic impoverishment of ecosystems ... in terms of the “degradation in the structure, function or composition of an ecosystem.” UNEP’s 2007 GEO-4 Report frequently uses the term “degraded” to describe the state of many elements of the environment. The United Nations 2005 Millennium Ecosystem Assessment describes global ecosystem services as being ***“degraded” or used unsustainably..*** Aldo Leopold defined “land health” as the “capacity for self-renewal in the soils, waters, plants, and animals that collectively comprise the land.” To Leopold, “a thing is right when it tends to preserve the integrity, stability and beauty of the biotic community.” Wendell Berry has taught that “land health” is the “one value” that upholds the entire web of life, that human well-being is linked to land health; and that a property rights system intended to promote the public welfare must discourage land uses that threaten land health.

...

Thus, “ecological degradation” is intended to mean the biotic impoverishment and decline in the self-sustaining and self-renewing capacity of the biosphere.¹⁶

“Degradation of ecological heritage” would therefore refer to activities which individually or cumulatively destroy Jamaica’s natural heritage and/or reduce the ability of its natural heritage to sustain and renew itself.

¹⁵ Dinah Shelton and Alexandre Kiss, *Judicial Handbook on Environmental Law*, (2005 United Nations Environmental Program), 109

¹⁶ Joseph H. Guth, ‘Law for the Ecological Age’, (2008) 9 Vt. J. Env’t. L. 431, 495-496 (available at <http://www.vjel.org/journal/pdf/VJEL10068.pdf>).

Arguably, every human action has some effect on the environment. For this reason, Guth outlines some principles to delimit the scope of ecological degradation:

[I] propose a new tort of ecological degradation. This new rule of law is designed to redefine how we resolve conflicts between environmental and other interests in view of our current circumstances. It is intended to recognize that ***we must learn to live within the ecological constraints of the Earth, and that exceeding those constraints is to the long-term detriment of the public welfare, especially that of future generations...***

Ecological Degradation

Sec. 1. A person is subject to liability for ecological degradation if his or her conduct is a legal cause of an unreasonable ecological threat.

Sec. 2. An ecological threat is any effect on the natural world that may contribute to ecological degradation.

Sec. 3. An ecological threat is unreasonable unless the person whose conduct is a legal cause of the threat demonstrates by a preponderance of evidence that the threat does not contribute to ecological degradation.

Sec. 4. A person whose conduct is a legal cause of an unreasonable ecological threat may be relieved of some or all liability for ecological degradation if the person demonstrates by a preponderance of the evidence that:

(a) The person has no feasible alternative to the conduct that is likely to contribute less to ecological degradation; and

(b) The person is conducting a vigorous program to develop such a feasible alternative.

Sec. 5. Any member of a community that may be affected by an ecological threat may bring an action for ecological degradation."¹⁷

¹⁷ Joseph H. Guth, 'A Law To Protect The Earth: The Tort of Ecological Degradation', 5 (available at <http://www.sehn.org/lawpdf/ALawToProtectTheEarth.pdf>).

REMEDIES

Sections 19(3) and (4) of the Constitution of Jamaica provides:

(3) The Supreme Court shall have original jurisdiction to hear and determine any application made by any person in pursuance of subsection (1) of this section and ***may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of this Chapter to the protection of which the person concerned is entitled.***

(4) Where any application is made for redress under this Chapter, the Supreme Court may decline to exercise its powers and may remit the matter to the appropriate court, tribunal or authority if it is satisfied that adequate means of redress for the contravention alleged are available to the person concerned under any other law.

In relation to remedies for contravention of the constitutional right to a healthy environment, the *Judicial Handbook on Environmental Law* states:

The remedial challenge presented by a given case will depend on the nature of the case. Because constitutional mandates are typically expressed generally and without remedial guidance, remedies in cases involving constitutional violations may, in particular, require judicial discretion and creativity. Judges may, for example:

- ***order a halt to unconstitutional conduct,***
- ***direct that specific remedial actions be undertaken,***
- ***compensate for past wrong, and/or***
- ***provide for a complex, prolonged regime of performance.***

While remedies are very much case-specific, and turn on the nature of the violation and the prayer for relief in the case, ***courts tend to give priority to the following kinds of remedies in environmental cases:***

1. ***Injunctive relief to halt the harmful activity;***
2. ***Damages to compensate for harm suffered;***
3. ***Orders of restitution or remediation;***
4. ***Sanctions to punish the wrongdoer and to deter future violations; and***
5. ***Awards of costs and fees.***¹⁸

¹⁸ Dinah Shelton and Alexandre Kiss, *Judicial Handbook on Environmental Law*, (2005 United Nations Environmental Program), 53-54.

**A BRIEF LOOK AT THE WORDING OF ENVIRONMENTAL RIGHTS
IN OTHER CONSTITUTIONS**

- For a more complete consideration, see James R. May and Erin Daly 'Vindicating Fundamental Environmental Rights Worldwide' (2009) *Oregon Review Of International Law* [Vol. 11] 365, 383-390 (available at <http://www.law.uoregon.edu/org/oril/docs/11-2/May.pdf>).

AFRICA

SOUTH AFRICA

- Right to environment provided in section 24 of the Constitution of South Africa
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-*
- (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.*

The wording of section 24(a) is similar to section 13(3)(l) of the Constitution of Jamaica—

- SA: “an environment that is not harmful to their health or well-being”
- JAM: “healthy and productive environment free from the threat of injury or damage from environmental abuse and degradation of the ecological heritage”

The Jamaican Constitution does not go as far as 24(b), however, which explicitly requires the SA government to take steps to protect the environment through laws to prevent pollution and ecological degradation, promote conservation, and secure sustainable development and use of natural resources.

ASIA

INDIA

- Even before an environmental right was explicitly incorporated in the constitution, courts found the right to environment to be included in the right to life:

Joint UNEP-OHCHR Expert Seminar on Human Rights and the Environment
 14-16 January 2002, Geneva: Background Paper No. 4 -- "**Human Rights and the Environment: the national experience in South Asia and Africa**" by Dr Jona Razzaque
 Available at http://www2.ohchr.org/english/issues/environment/environ/bp4.htm#_ftnref4

2.1. The Right to Life

2.1.1. India

Environmental deterioration could eventually endanger life of present and future generations. Therefore, the right to life has been used in a diversified manner in India. It includes, *inter alia*, the right to survive as a species, quality of life, the right to live with dignity and the right to livelihood. In India, this has been expressly recognised as a constitutional right. However, the nature and extent of this right is not similar to the self-executory and actionable right to a sound and healthy ecology prescribed in the Constitution of the Philippines. [1] **Article 21 of the Indian Constitution states: 'No person shall be deprived of his life or personal liberty** except according to procedures established by law.' The Supreme Court expanded this negative right in two ways. Firstly, any law affecting personal liberty should be reasonable, fair and just. [2] Secondly, the **Court recognised several unarticulated liberties that were implied by article 21.** [3] **It is by this second method that the Supreme Court interpreted the right to life and personal liberty to include the right to a clean environment.** [4]

In addition, the Constitution (Forty Second Amendment) Act 1976 explicitly incorporated environmental protection and improvement as a part of state policy. *Article 48A, a Directive Principle of State Policy, provides that: 'The State shall endeavour to protect and improve the environment and safeguard the forests and wildlife of the country.'* Moreover, article 51A (g) imposes a similar responsibility on every citizen 'to protect and improve the natural environment including forests, lakes, rivers and wildlife, and to have compassion for living creatures....'. Therefore, protection of natural environment and compassion for living creatures were made the positive fundamental duty of every citizen. Both the provisions substantially send the same message. Together, they highlight the national consensus on the importance of the protection and improvement of the environment. The wordings of the articles show that the nature of such obligation under the state policy is non self-executing.

The following discussion shows how the courts have dealt with human rights and the environment during the last decade. **Link between environmental quality and the right to life was first addressed by a constitutional bench of the Supreme Court in the Charan Lal Sahu Case.** [5] **In 1991, the Supreme Court interpreted the right to life guaranteed by article 21 of the Constitution to include the right to a wholesome environment. In Subash Kumar ,** [6] **the Court observed that 'right to life guaranteed by article 21 includes the right of enjoyment of pollution-free water and air for full enjoyment of life.'**

Through this case, the court recognised the right to a wholesome environment as part of the fundamental right to life. This case also indicated that the municipalities and a

large number of other concerned governmental agencies could no longer rest content with unimplemented measures for the abatement and prevention of pollution. They may be compelled to take positive measures to improve the environment. This was reaffirmed in M.C. Mehta v. Union of India. [7] The case concerned the deterioration of the world environment and the duty of the state government, under article 21, to ensure a better quality of environment. **The Supreme Court ordered the Central government to show the steps they have taken to achieve this goal through national policy and to restore the quality of environment.**

In another case, [8] the Supreme Court dealt with the problem of air pollution caused by motor vehicle operating in Delhi. It was a public interest petition and the court made several directions towards the Ministry of Environment and Forests. Decisions such as this indicate a new trend of the Supreme Court to fashion novel remedies to reach a given result, although these new remedies seem to encroach on the domain of the executive. [9]

[1] Section 16, Article II of the 1987 Constitution states: '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 along with Right to Health (section 15) ascertains a balanced and healthful ecology. *Minors Oposa v. Sec. of the Department of Environment*, 33 ILM 173 (1994) See also, Antonio G.M. La Vina, 'The Right to a Sound Environment in the Philippines: The Significance of the Minors Oposa Case' (1994) RECIEL Vol 3, No.4, pg.246-252.

[2] *Maneka Gandhi v. Union of India*, AIR 1978 SC 597, 623-624. *Francis Coralie Mullin v. The Administrator, Union Territory of Delhi*, AIR 1981 SC 746, 749-750.

[3] Directive principle such as equal pay for equal work, free legal aid, right to speedy trial, right to livelihood, right to education and DP relating to environment [Article 48-A] are read in conjunction with the fundamental rights.

[4] P. Leelakrishnan, *Law and Environment* (1992, Eastern Book Company, India) Chapter 10, pg.144-152.

[5] *Charan Lal Sahu v. Union of India* AIR 1990 SC 1480.

[6] *Subhash Kumar v. State of Bihar* (AIR 1991 SC 420/ 1991 (1) SCC 598.

[7] (1998) 9 SCC 589. In *K. Ramakrishnan v. State of Kerala* [AIR 1999 Kerala 385] the court held that smoking in public places causes positive nuisance.

[8] *M.C. Mehta v. Union of India* (1991) AIR SC 813 (Vehicular Pollution Case); (1992) Supp. (2) SCC 85; (1992) Supp. (2) SCC 86; (1992) 3 SCC 25.

[9] Armin Rosencranz et al, in 'Region/country report: South Asia: India' (1993) Yearbook of International Environmental Law, vol. 4. 415-419.

Cases:

- *Charan Lal Sahu v. Union of India* AIR 1990 SC 1480
- **Subhash Kumar v. State of Bihar** (AIR 1991 SC 420/ 1991 (1) SCC 598 – case report can be accessed at <http://www.ielrc.org/content/e9108.pdf>

Case Note: Case concerning alleged pollution of the river Bokaro River by the release of slurry/sludge into it by an industrial unit located on its banks. The Court opined that **though the right to life guaranteed under Article 21 of the Constitution includes the right to enjoyment of pollution free water** and that a citizen had recourse to Article 32 of the Constitution for removal of pollution from water, in the present case adequate steps had been taken by the State Pollution Control Board and the industry concerned to prevent pollution. Although the petitioner had approached the Court through a public interest

Litigation, it was his private interests and grudges that he sought to fulfill. The Court held that this could not be permitted as it would amount to an abuse of the process of the Court.

Singh J at [7]: Article 32 is designed for the enforcement of Fundamental Rights of a citizen by the Apex Court. It provides for an extraordinary procedure to safeguard the Fundamental rights of a citizen. **Right to live is a fundamental right under Art. 21 of the Constitution and it includes the right of enjoyment of pollution free water and air for full enjoyment of life. If anything endangers or impairs that quality of life in derogation of laws, a citizen has right to have recourse** to Art. 32 of the Constitution for removing the pollution of water or air which may be determined to the quality of life.

PHILIPPINES

- Right is found in Article II, Section 16 [State Policies]

Section 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.

- **Oposa (Minors) v Secretary of the Department of Environment and Natural Resources; syllabus:**

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.

LATIN AMERICA

ARGENTINA

- Protected in section 41 of Constitution 1994—

Section 41:

- (1) 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.*

- (2) *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.*
- (3) *The Nation shall regulate the minimum protection standards, and the provinces those necessary to reinforce them, without altering their local jurisdictions.*
- (4) *The entry into the national territory of present or potential dangerous wastes, and of radioactive ones, is forbidden.*

CHILE

- Found in Article 19(8), which “guarantees to all persons”:

The right to live in an environment free from contamination. It is the duty of the State to watch over the protection of this right and the preservation of nature.

The law may establish specific restrictions on the exercise of certain rights or freedoms in order to protect the environment;

COLOMBIA

- Provided in Article 79 of Constitution

Every person has the right to enjoy a healthy environment. The law will guarantee the community's participation in the decisions that may affect it.

It is the duty of the state to protect the diversity and integrity of the environment, to conserve areas of special ecological importance, and to foster education for the achievement of these ends.

COSTA RICA

- Found in Articles 46 and 50 of the Constitution

*Article 46 [which governs corporate entities]: **Consumers and users are entitled to the protection of their health, environment, safety and financial interests, to receive adequate and truthful information, to freedom of election and to equal treatment. The State shall support any bodies established for the defense of their rights. The law shall regulate those matters.***

Article 50: The State shall procure the greatest welfare of all inhabitants of the country, organizing and promoting production and the most adequate distribution of wealth.

Every person has the right to a healthy and ecologically balanced environment, being therefore entitled to denounce any acts that may infringe said right and claim redress for the damage caused.

The State shall guarantee, defend and preserve that right. The Law shall establish the appropriate responsibilities and penalties.

ECUADOR

- Right to a healthy environment guaranteed in Articles 14 and 15 of Constitution

Article 14: The right of the population to live in a healthy and ecologically balanced environment that guarantees sustainability and the good way of living, is recognized.

Environmental conservation, the protection of ecosystems, biodiversity and the integrity of the country's genetic assets, the prevention of environmental damage, and the recovery of degraded natural spaces are declared matters of public interest.

Article 15: The State shall promote, in the public and private sectors, the use of environmentally clean technologies and nonpolluting and low-impact alternative sources of energy. Energy sovereignty shall not be achieved to the detriment of food sovereignty nor shall it affect the right to water.

The development, production, ownership, marketing, import, transport, storage and use of chemical, biological and nuclear weapons, highly toxic persistent organic pollutants, internationally prohibited agrochemicals, and experimental biological technologies and agents and genetically modified organisms that are harmful to human health or that jeopardize food sovereignty or ecosystems, as well as the introduction of nuclear residues and toxic waste into the country's territory, are forbidden.

- **Vindicating Fundamental Environmental Rights Worldwide - James R. May and Erin Daly, Oregon Review Of International Law [Vol. 11, 365]**

Page 395: The Constitutional Court of Ecuador has embraced that country's enshrinement of fundamental environmental rights. In *Fundación Natura v. Petro Ecuador*, the court turned to a constitutional right to live in a "healthy" environment when it upheld a civil verdict concluding that Petro Ecuador's production of leaded fuel violated federal law.179 In *Arco Iris v. Instituto Ecuatoriano de Minería*, the Court concluded that the company's 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.

GUATEMALA

- Article 97 of the Constitution imposes a duty on the State, municipalities and inhabitants to sustain the environment.

Article 97: The environment and ecological balance. The State, municipalities and the inhabitants of the country are required to promote the social, economic and technology to prevent environmental pollution and maintain ecological balance. It will dictate all the rules

necessary to ensure that the use and development of wildlife, flora, land and water are made rationally, avoiding predation.

➤ **Joint UNEP-OHCHR Expert Seminar on Human Rights and the Environment**

14-16 January 2002, Geneva: Background Paper No. 6

**Review of jurisprudence on human rights and the environment
in Latin America [1]**

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<http://www2.ohchr.org/english/issues/environment/environ/bp6.htm>

The Right to a Healthy Environment

Judges in Latin America have stated without reserve that the right to a healthy environment is a fundamental human right. In rendering their decisions, the judiciary researched the status of this right and considered the need to protect it. Given the depth of these decisions, it is worthwhile to review selected excerpts.

ARGENTINA

In Argentina, *the National Constitution recognizes since 1994 the right to a healthy and suitable environment. However, even before the law provided for such explicit recognition, courts had acknowledged the existence of the right to live in a healthy environment.*

Already in 1983, and before the formulation of this right was introduced in Argentinean jurisprudence, an administrative court stated that *"the right of any citizen to preserve his or her habitat amounts to a subjective right" and that such right would entitle any person to initiate an action for environmental protection (case Kattan, Alberto and others v. National government).*

In a 1993 case concerning environmental harm to fisheries and wildlife in a lagoon (case *Irazu Margarita v. Copetro S.A.*) the court asserted:

The right to live in healthy and balanced environment is a fundamental attribute of people. Any aggression to the environment ends up to becoming a threat to life itself and to the psychological and physical integrity of the person -- which is based on ecological balance. [2]

After the Constitution's modification, this right has been often recognized by the judiciary and interpreted broadly. In the 1994 case of *Alberto Sagarduy* the court considered the right to defend everyone's environment as a "natural human right", which allows citizens to place any complaints to government agencies regardless of the existence of a specific administrative procedure. [3]

It is also interesting to note a decision of 1999 in which the court established that the right to live in a suitable environment and to enjoy an adequate standard of living merits an extensive interpretation, covering as a result the broadest possible number of environmental offences, including, as in the case, the right to enjoy the ocean's view - impaired by the construction of a wall (case of *Sociedad de Fomento Barrio Félix v. Camet y otros*).

COLOMBIA

In the pioneer case *Fundepúblico v. Mayor of Bugalagrande and others*, of 1991-1992, the plaintiffs sought to prevent actual and imminent damage as a result of an asphalt plant's operations in their town. The Constitutional Court explained the right to the environment, which had then just been incorporated in the 1991 Colombian Constitution: "***[the right to the environment] has been conceived 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, in addition to his normal participation and integral development in society.***"

In the same case the Court of First Instance had stated in 1991: "*Everyone has the right to enjoy and live in a healthy environment. This should be regarded as a fundamental human right, which is a prerequisite and basis for the exercise of other human, economic and political rights. It should be recognised 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 the case of *Antonio Mauricio Monroy Cespedes*, in 1993, the Court observed that "*side by side with fundamental rights such as liberty, equality and necessary conditions for people's life, there is the right to the environment [.] The right to a healthy environment cannot be separated from the right to life and health of human beings. In fact, factors that are deleterious to the environment cause irreparable harm to human beings. If this is so we can state that the right to the environment is a right fundamental to the existence of humanity.*" [\[4\]](#)

Referring to the relationship between domestic law and international law, the court stated in the *Santa Marta* case, that "the main obligation and faculty of the judge [*juez de tutela*] is to comply with [the constitution] before any other foreign norm, particularly when fundamental rights such as the right to life, to healthy and to the environment are being attacked."

COSTA RICA

The Supreme Court of Costa Rica affirmed the right to a healthy environment in a 1993 case concerning the use of a cliff as a waste dump (case *Carlos Roberto García Chacón*). Quoting the First Instance Court, the Supreme Court stated that life:

is only possible when it exists in solidarity with nature, which nourishes and sustains us -- not only with regard to food, but also with physical well-being. It constitutes a right that all

citizens possess to live in an environment free from contamination. This is the basis of a just and productive society. [5]

GUATEMALA

In the case *Concesiones Otorgadas por el Ministerio de Energía y Minas a Empresas Petroleras* (1999) the environmental ombusman made a close connection between the protection of human rights and the environment: "Lack of interest and irresponsibility on the part of authorities in charge of National Environmental Policy [...] amounts to a violation of human rights, considering that it impairs the enjoyment of a healthy environment, the dignity of the person, the preservation of the cultural and natural heritage and socio-economic development."

The right to a healthy environment AND FUTURE GENERATIONS

Courts have also explained the right to a healthy environment in relation to the rights of future generations.

[1] This review is partly based on a previous article by Adriana Fabra, "Enforcing the right to a healthy environment in Latin America", published in the RECIEL, vol. 3:4 (1994). The authors wish to thank the generous contribution of the following lawyers and organizations without whose assistance this paper would not have been possible: Eduardo Astorga, Chile; Cedarena, Costa Rica; Centro de Derechos Humanos y Medio Ambiente, Argentina; Centro de Estudios Ambientales, Argentina; Cordavi, Ecuador; Fundepúblico, Colombia; Virginia Gascón y la Fundación Derecho y Recursos Naturales, Argentina; IDEADS, Guatemala, and The Sociedad Peruana de Derecho Ambiental, Peru. Translations of original texts are made by Adriana Fabra.

[2] Similarly, in the Case *Hugo Almada*, the court considered that the right to the protection of the environment was implicitly recognized in the Constitution, in relation to the rights to life and health. Case *Hugo Almada*, Suprema Corte de Justicia de la Ciudad de Buenos Aires, Ruling of 19.5.1998. LLBA, 1998-943 - RCyS, 1999-530.

[3] In a later decision, the Criminal Court of Mar del Plata stated that the burden of proof of the existence of the right to the environment does not fall upon the plaintiff but it is for the court - if willing to apply any restrictions to it - to provide the necessary arguments (case of Eugenio Jaime).

[4] For other rulings that examine the relationship between the environment and the life of human beings see: decision num. 411, of 17 June 1992; 428, of June 1992; 451, of July 1992 and 536, of September 1992. They have stated that the right to the environment is a fundamental human right.

[5] Other cases where also the right to a healthy environment was recognised as a fundamental human right: *Presidente de la sociedad MARLENE SA v. Municipalidad de Tibás, el Ministerio de Salud y v. José Joaquín Murillo Murillo*. Sala Constitucional de la Corte Suprema de Justicia. Decision N° 6918/94; case *Hans Georg Kuster*. Sala Constitucional de la Corte Suprema de Justicia. Recurso de Amparo. Decision 5260/96, of 4.10.1996 and case *Asociación Palmareña para la recuperación del Ambiente*. Sala Constitucional de la Corte Suprema de Justicia. Recurso de Amparo. Decision 5974/01, of 19.8.1998.

CARIBBEAN

GUYANA

Preamble:

“Demonstrate our commitment to protect our natural environment and endowment.”

Section 25:

Every citizen has a duty to participate in activities designed to improve the environment and protect the health of the nation.

Section 36:

In the interests of the present and future generations, the State will protect and make rational use of its land, mineral and water resources, as well as its fauna and flora, and will take all appropriate measures to conserve and improve the environment.

Jamaica Environment Trust
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