



XXI MEETING OF THE FORUM OF MINISTERS OF ENVIRONMENT OF LATIN AMERICA AND THE CARIBBEAN

Buenos Aires, Argentina

11 – 12 October, 2018

The Honourable Mr. Justice Winston Anderson
Judge, Caribbean Court of Justice

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I have been asked to reflect on the main advances and challenges to the consolidation of the rule of law in environmental matters and the protection of environmental rights in our region of Latin American and the Caribbean. The region has made great strides in environmental protection but as we will see there remain several challenges that must be confronted.

Firstly, there has been widespread acceptance by the countries in Latin America and the Caribbean of global multilateral environmental agreements. In the over twenty-five years since the 1992 Rio Declaration, our region has adopted treaties on climate change, protection of biodiversity, and the protection of the environment from harmful chemicals such as the 2013 Minamata Convention on Mercury. We have seen a dramatic acceleration in the rate of treaty acceptance. In the entire history of environmental law before 1992, there were only 70 signatures or acceptance of the 18 most important Multilateral Environmental Agreements (MEAs) among the Latin American and Caribbean countries compared to 433 since 1992. This represents an increase of 600 percent.

Recent developments are telling. On 10 May 2018, the UNGA adopted Resolution 72/277 on the Global Pact for the Environment to provide an overarching framework to international environmental law which will identify and fill gaps, and further solidify and advance international environmental law by encouraging implementation of the Sustainable Development Goals. The Resolution was supported by twenty-five regional countries: 8 from the Caribbean and 17 from Latin America. Some, such as Costa Rica, have publicly advocated for the Pact. We are

pleased that the UN Secretary-General will seek to establish a trust fund to assist developing countries, and particularly small island developing states to participate in the process of further developing the Pact. And just over two weeks ago, on 27 September 2018, we adopted the very important regional Escazu Agreement on environmental access rights, this is the agreement about which we will hear much more shortly, from ECLAC.

The fact, therefore, is that there is a network of legally binding agreements at the global and regional levels that provide a platform for environmental protection and management. These provide the ground floor for the rule of law. Equally excitingly, these agreements provide the opportunity to harmonize initiatives to protect the global and regional environment. The challenge is to ensure implementation and I will return to this later.

Secondly, there has been a widespread advancement in environmental law at the national level. In relation to *access to environmental justice*, some 20 countries of the region recognize in their constitutions the right to a healthy environment and the right to take legal action where this right is infringed. Examples are to be found in article 5 of the constitution of Belize; article 88 of the constitution of Colombia; and article 17 of the constitution of Mexico. Note also that administrative mechanisms have also been established to ensure recourse to the courts or some other independent body when environmental laws are contravened.

At least 14 countries have *specialized courts to deal with environmental issues*, such as in Bolivia (agro-environmental courts in nine cities), Brazil (federal courts); Chile (three environmental courts); Costa Rica (one administrative environmental court and 16 agricultural courts (15 of first instance and one appeals court)); El Salvador (one environmental court; four environmental courts were authorized in 2014, of which three were courts of first instance and one an appeals court); Paraguay (two environmental courts) and Peru (four environmental courts). In the Caribbean, Trinidad and Tobago has an active Environmental Commission and there is a provision in the legislation for a similar body in Guyana, but it has not yet been operationalized.

At least 1/3 of the region's countries are extremely liberal which allow anyone with standing to *initiate legal proceedings* in defence of diffuse interests or the environment. *Actio popularis* actions are commonplace. In Argentina, article 30 of

Act No. 25675 provides that once some environmental damage has occurred, anyone may apply for a cessation of the activities causing it. Similarly, under article 69 of the Environmental Management Act in Trinidad and Tobago, any person or group of persons may initiate an action in the Environmental Commission, claiming a violation of environmental requirements. All that the claimants need to do is to “express a general interest in the environment or a specific concern with respect to the claim violation”.

Many countries have developed laws on the *reversal of the burden of proof*. Legislation and constitution place the onus of proof on the actor i.e., the developer or industrialist, to show that his actions do not harm the environment¹. This is explicitly recognized in Argentina, Ecuador and El Salvador. In Argentina, a combination of article 28 (objective liability for environmental damage) and article 29 (which provides that exoneration from liability for damage occurs only when a third party proves to have been responsible for it) of the General Environment Act. In Ecuador, article 397.1 of the constitution states that the burden of proving the absence of potential or actual damage shall fall upon the party conducting the activity or the defendant. Jurisprudence is also growing in Argentina and Brazil with respect to dynamic reversal of proof (burden of proof falls upon the party best placed to provide it). In Guyana, reversal of the burden of proof is implicitly recognized through the adoption of the precautionary principle²; and the avoidance principle³: “it is preferable to avoid environmental damage as it can be impossible or more expensive to repair rather than prevent”.

¹ See the *Vellore* case at p. 658 (1996(5) SCC 647) per Kuldip Singh, J. This is often termed as a reversal of the burden of proof, because otherwise in environmental cases, those opposing the change would be compelled to shoulder the evidentiary burden, a procedure which is not fair. Therefore, it is necessary that the party attempting to preserve the *status quo* by maintaining a less-polluted state should not carry the burden of proof and the party who wants to alter it must bear this burden. (See James M. Olson, *Shifting the Burden of Proof*, 20 *Envtl. Law* p. 891 at 898 (1990). (Quoted in Vol. 22 (1998) *Harv. Env. Law Review* p. 509 at 519, 550).

² Section 4 (4) (b), Environmental Protection Act, 1996, Guyana, The precautionary principle suggested that where there is an identifiable risk of serious or irreversible harm, including, for example, extinction of species, widespread toxic pollution in major threats to essential ecological processes, it may be appropriate to place the burden of proof on the person or entity proposing the activity that is potentially harmful to the environment. (See Report of Dr. Sreenivasa Rao Pemmaraju, Special Rapporteur, International Law Commission, dated 3.4.1998, para 61). See further: *Ashburton Acclimatisation Society v. Federated Farmers of New Zealand*, 1988(1) NZLR 78.

³ Section 4 (4) (d), Environmental Protection Act, 1996, Guyana.

There have also been significant strides in *removing or reducing financial and other barriers* in the way of individuals bringing environmental actions. In Mexico, article 29 of the Federal Environmental Liability Act stipulates that “except in the cases provided for by articles 23 and 28 of the present Act, no party shall have legal costs and expenses awarded against them”. In Colombia, article 19 of Act No. 472 of 1998 developing article 88 of the Constitution in relation to the exercise of actions for collective and group redress and establishing other provisions provides for a poverty amparo, stating that the judge may apply this where appropriate in accordance with the Code of Civil Procedure, or when the Ombudsman or his or her deputies explicitly so request. It adds that where a poverty amparo is applied, the cost of commissioning expert reports is to be met by the Collective Rights and Interests Defence Fund once created. The defendant shall reimburse these costs to the Fund at the same time as settling other legal costs if found against. In Brazil, article 18 of Act No. 7347 on Public Civil Action (1985) states that, in the actions covered by the Act, no advances are to be paid on costs, emoluments, expert fees or any other expense, nor are lawyers’ fees or legal costs and expenses to be awarded against the association bringing the claim unless bad faith is demonstrated. In Argentina, article 32 of Act No. 25675 provides that there will be no restrictions of any kind regarding access to jurisdiction over environmental matters. This formula is accepted in court proceedings to obviate payment of access fees or costs for litigants in cases of this kind.

Thirdly, and very encouragingly, there is growing evidence that the platforms established in our laws, regulations and judicial decisions are increasingly being used by citizens of our region to advance environmental protection. The environmental non-governmental organization AIDA highlighted several such incidents during 2017⁴. These include the organization of citizens in the small town of Cajamarca in Colombia to successfully reject open-pit gold mining in their territory; the return by energy companies of water rights to two Patagonian rivers to the Chilean government following the agitation of local communities; the establishment by Costa Rica of its first national fund dedicated exclusively to conserving the ocean – the money collected will be used for control, surveillance, cleaning, recycling, seeking productive alternatives, and other research for the

⁴ AIDA, 2017 Annual Report, https://aida-americas.org/sites/default/files/publication/reporte_anual_2017_ing_digital_final.pdf; accessed October 10, 2018.

benefit of the seas; the victory of indigenous communities in Peru when the Inter-American Commission on Human Rights granted protective measures to people affected by the 2014 oil spills. In Trinidad and Tobago, Fishermen and Friends of the Sea, a Trinidad & Tobago ENGO, won an interim injunction in April 2018 to prevent the building of a new 5,000 metre stretch of highway that would run to the border of the Aripo Nature Reserve. Although the injunction was discharged on 1 October by the Privy Council⁵ the exercise forced a searching examination of the role of the Environmental Management Agency in granting a certificate of environmental clearance for development projects.

Notwithstanding the advances made in the cause of environmental protection and environmental law significant challenges remain. There remain challenges to the international community, to national legislatures and judiciaries to fill gaps and develop further environmental rules and concepts. As an example, there continue to be discussions about the adoption of the “rights of nature”: as to who should advocate for the rights of nature. There is a possible precedent in Ecuador, where the constitution endows nature with rights and article 71 states that any person, community, people or nationality can demand that the public authority enforce the rights of nature. In Colombia, a recent judgment by the Constitutional Court recognizes the river Atrato and its basin and tributaries as an entity with a right to protection, conservation, maintenance and restoration, for which the State and ethnic communities are responsible.

Secondly, there is the challenge of developing practical mechanisms to ensure that the promise of access to justice is realized. A practical problem may just be the geographical coverage. Long distances can mean that access to justice is prohibitively expensive and time-consuming. Brazil’s response to this challenge has been itinerant justice. A number of state-level courts have put together itinerant justice teams who travel by bus or boat to remote or hard-to-reach areas. These teams are made up of judges, prosecutors, defence attorneys, conciliators and other professionals.

Thirdly, there is the challenge of ensuring the fullest implementation of our treaties and laws. Signing or accepting environmental agreements is not sufficient. Our state agencies must put the resources and the political will into implementing the law to

⁵ Fishermen and Friends of the Sea v Environmental Management Agency. Heard 30 July 2018, judgment delivered 1 October 2018 (Lord Carnwarth).

protect the environment and to protect defenders of the environment. All too often there are incidents involving physical attacks on environmental defenders which is a double violation: not just of environmental rights but – in a very direct way – their human rights and dignity. This practice is intolerable, and everyone must do what is necessary to eradicate it.

Finally, a significant challenge is to raise the general level of adherence to environmental rule of law in the region. Some countries are far advanced; others are a bit behind. We need to devise a space and/or mechanism whereby we can talk with each other; learn from each other and encourage and support each other. I know that there are issues related to our diversity, cultural language, legal systems but there must be a way to open the necessary dialogue. I am pleased to say that the Ezcasu Agreement provides a kind of template that can be adopted. One spin-off of the Agreement has been the collaboration between its secretariat and the CCJ Academy for Law on the research and publication of the title, *“Ensuring Environmental Access Rights in the Caribbean: Analysis of Selected Case-Law”*. The book examines the legislative and judicial practice in the Caribbean concerning access to environmental information, to public participation, and to justice and forms examples that may be of interest and utility to other countries in the region.

Thank you.