Shared Knowledge, Shared Jurisprudence: Learning to Speak Environmental Law Creole (*Criollo*)

Thomas T. Ankersen*

"*It inna di law*"
—Jamaican Creole expression

* Legal Skills Professor and Director, University of Florida/University of Costa Rica Joint Program in Environmental Law and Conservation Clinic. The author wishes to acknowledge lawyers and University of Florida graduate students Byron Real (Ecuador), Astrid Puentes (Colombia), and Franklin Paniagua (Costa Rica) for their research and editorial assistance and the John D. and Catherine T. MacArthur Foundation for helping to make it, and much of the jurisprudence described in this Article, possible.

I. PROLOGUE

In August 2002, a group of legal scholars and practitioners traveled to Havana, Cuba, to explore the development and application of environmental law in Cuba.[1] One meeting took place in the formal confines of the Cuban National Union of Jurists. Prompted by a question concerning an interpretation of Law No. 81,[2] Cuba's framework environmental law, a debate ensued concerning the standing of citizens to represent the public interest in environmental cases. A lawyer from Cuba's Attorney General's office argued that a provision of the law required such cases to be brought by the government. However, the chief lawyer from the Ministry of Science, Technology and the Environment (CITMA), Cuba's environment ministry, argued that another provision granted broader standing.[3] This was a debate that could have occurred in any bar association meeting or law faculty lounge anywhere. That it occurred in Cuba may seem remarkable. But the truth of the matter is, despite the political divide, lawyers are lawyers everywhere, and there are environmental lawyers in Cuba.[4] Increasingly, throughout Latin America and the Caribbean, environmental lawyers are pushing the envelope and testing the jurisprudential waters.

II. INTRODUCTION

The character of the legal and judicial systems in Latin America and the Caribbean is undergoing fundamental change.[5] Traditionally weak judiciaries are emboldened, precedent as a jurisprudential decision-

---

1. *See* Oliver A. Houck, *Environmental Law in Cuba*, 16 J. LAND USE & ENVTL. L. 1-18 (2000).

2. Ley del Medio Ambiente, LEY NO. 81 [Environmental Law, LAW NO. 81] (1997) (Cuba), *translated in* CUBAN ENVIRONMENTAL LAW 21 (Jerry Speir ed., 1999).

3. *Compare* LEY NO. 81, art. 71 (providing that only the Attorney General and Environment Minister can act "in defense of the social interest in environmental protection"), *with* LEY NO. 81, art. 4(l) (providing that every natural or legal person must have "adequate and sufficient" access to judicial and administrative redress).

4. Despite the fascinating colloquy, the access to the courts debate in Cuba continues to be largely academic. At the time of the exchange only one environmental case had ever been brought before a Cuban civil court (it settled) and no citizens have sought to use the more expansive interpretation of the enforcement measure to pursue an administrative action. Interview with Teresa Cruz, attorney, Ministerio de Ciencia, Tecnología y Medio Ambiente (CITMA), in Havana, Cuba (Aug. 14, 2002).

5. For a discussion of the politics of Latin American judicial reform movements and their relationship to international development policy, see JUSTICE DELAYED: OBSTACLES TO JUDICIAL REFORM IN LATIN AMERICA 15-30 (Edmundo Jarquin & Fernando Carrillo eds., 1998); Linn Hammergren, *Fifteen Years of Judicial Reform in Latin America: Where We Are and Why We Haven't Made More Progress*, *at* http://www.uoregon.edu/~caguirre/hammergren.html (last visited June 5, 2003).

making tool has become increasingly important, the apparatus of administrative law has become more sophisticated and complex, and increasingly sophisticated reporting systems and the "globalization" of shared jurisprudence through contemporary communication media have all contributed to the development of law in the region. These broader systemic developments, though uneven and incomplete, have occurred in tandem with the emergence of environmental law as a unique and discrete body of law.

This Article traces several of the more interesting jurisprudential developments that have resulted from, or that have benefited, environmental law in the region and the knowledge sharing mechanisms that have contributed to the emergence of a shared hemispheric environmental jurisprudence.[6] This shared jurisprudence represents a "new environmental law" (*derecho ambiental*) that is not solely rooted in the civil or common law, but represents instead, a "legal creole" that relies on both traditions and requires the skills of each.

III. EVOLUTIONARY DEVELOPMENTS IN ENVIRONMENTAL LAW IN THE LATIN AMERICAN AND CARIBBEAN REGION

A. Agrarian Roots: The Social Function of Ecological Possession

In the 1980s and early 1990s, tropical deforestation was the major concern of northern nongovernmental organizations (NGOs), many of their southern counterparts, and international and bilateral development agencies. The root cause of deforestation was perceived to be poverty and land tenure insecurity. The "agricultural frontier" was viewed by many Latin American governments as a safety valve against swelling urban centers and popular discontent.[7] Agrarian reform laws born out of revolutions in the early and middle twentieth century supported colonization of the agricultural frontier by granting title based on improvements to the land.[8] The doctrinal basis for agrarian reform was

---

6. Many civil lawyers use the term "jurisprudence" in the narrow sense of the opinions of judges on cases, while common lawyers treat jurisprudence as all sources of law, particularly scholarly writings. This Article uses the term "jurisprudence" in its broadest Justinian (Roman Law) sense: "The knowledge of things divine and human, the science of the just and unjust." *See* GUILLERMO CABANELLAS DE TORRES, DICCIONARIO JURÍDICO ELEMENTAL 221 (14th ed. 2000).

7. One influential work in development policy describing the link between rural poverty, landlessness, and environmental destruction is H. JEFFREY LEONARD, NATURAL RESOURCES AND ECONOMIC DEVELOPMENT IN CENTRAL AMERICA, at xv-xvii (1987).

8. This is analogous to the U.S. "homesteading" laws of the mid-nineteenth century when the United States also had "*tierras baldías*" (vacant lands) and a frontier to be settled. *See* Preemption Act of 1841, ch. 16, 5 Stat. 453 (repealed 1891) (validating land claims to squatters);

grounded in the belief that property possesses an independent social function that should constrain individual property rights. This social function of property served as a justification for the breakup of large landholdings by wealthy elites, referred to as "*latifundios*."[9] Often these lands lay fallow, performing no social function. Colonization schemes enabled peasants to move onto seized lands, as well as *tierras baldías* (state-owned frontier lands that had not previously been titled), provided the land was improved in a way that restored the social function of the land. Where there were virgin forests this meant demonstrating possession, which usually entailed clearing the land for agriculture or other productive uses.[10] The legal basis for this development process is referred to as "*posesión agraria*."[11]

Latin America's conservation movement formed in this milieu, and many nonenvironmental organizations directed their initial energies toward biodiversity conservation and deforestation, often working with northern biodiversity protection and conservation interests to protect natural areas from formal and spontaneous colonization schemes.[12] Funding tied to biodiversity conservation often came through development agencies such as the United States Agency for International Development (USAID), European development organizations, and U.S. foundations. Environmental law groups emerged as a distinct subgroup to support Latin America's growing conservation movement. One of the first of the environmental law NGOs was *Centro de Derecho Ambiental y de los Recursos Naturales* (CEDARENA) in Costa Rica.[13] Formed in 1989, CEDARENA directed its initial efforts toward consolidating Costa

---

Homestead Act of 1862, ch.75, 12 Stat. 392 (repealed 1976) (permitting claims up to 160 acres of land if the homesteader cultivated land for five years).

9. *See* Steven E. Hendrix, *Property Law Innovation in Latin America with Innovations*, 18 B.C. INT'L & COMP. L. REV. 1, 7-8 (1995) (reviewing Latin American constitutional bases for the social function doctrine).

10. *See* Marianne Schmink, *The Rationality of Tropical Rainforest Destruction*, *in* MANAGEMENT OF FORESTS IN TROPICAL AMERICA: PROSPECTS AND TECHNOLOGIES 11, 11-30 (Julio C. Figueroa Colón et al. eds., 1987).

11. *See* ALVAO MEZA LAZARUS, LA POSESIÓN AGRARIA (1991); Ronald Fonseca Vargas, Análisis de la Posesión Agraria en la Jurisprudencia Costarricense (1993) (Tesis para optar el Grado de Licenciado en Derecho, Facultad de Derecho de la Universidad de Costa Rica).

12. For a description of this historical perspective in Costa Rica see STERLING EVANS, THE GREEN REPUBLIC: A CONSERVATION HISTORY OF COSTA RICA (1999).

13. *See* CEDARENA, *at* http://www.cedarena.org (last visited June 5, 2003). Around the same time similar environmental law NGOs appeared in Peru (*Sociedad Peruana de Derecho Ambiental*), Colombia (*Fundepublico*), and Mexico (*Centro Mexicano de Derecho Ambiental*).

Rica's Protected Areas System, particularly addressing land tenure and colonization on the agricultural frontier.[14]

In the 1990s, creative environmental lawyers and innovative agrarian law judges evolved a jurisprudential response to the social function doctrine and its *posesión agraria* corollary. Instead of discarding a doctrine that lies at the heart of the powerful Latin American agrarian reform movement, environmental lawyers and agrarian jurists have instead argued that possession can be demonstrated through ecological land management, or ecological possession. "*Posesión ecológica*" provides that the social function in Latin American property law can be achieved by retaining forest cover in the interest of biodiversity conservation, which can be demonstrated by caring for and conserving the land.[15] This jurisprudential device has been codified in some Latin American constitutions and agrarian statutes,[16] and has been utilized by agrarian jurists in Costa Rica.[17]

The Costa Rican jurisprudential development did not represent a straight leap from *posesión agraria* to *posesión ecológica*. In an early case important to the developing jurisprudence, the Costa Rica Supreme Court refused to recognize mere deforestation for the commercial extraction of timber as sufficient to establish *posesión agraria*.[18] Rather than suffer continued forest loss under the doctrine of *posesión agraria*, an agrarian court subsequently found that the social function could be accomplished through sustainable commercial forestry practices, a practice the court referred to as *posesión agraria forestal*.[19] From here, it

---

14. Several years later, CEDARENA led a regional effort to develop a network of environmental law institutions and attorneys in Central America. These efforts began by focusing environmental law research on the consolidation of a regional system of protected areas to safeguard the land bridge between North and South America known as the "Mesoamerican Biological Corridor." *See generally* Thomas T. Ankersen, *The Mesoamerican Biological Corridor: The Legal Framework for an Integrated, Regional System of Protected Areas*, 9 J. ENVTL. L. & LITIG. 499-549 (1994) (discussing the feasibility of establishing a regional institutional framework to protect the Mesoamerican Biological Corridor).

15. *See generally* Zdenka Puliksch, La Posesión Ecológica 71-72 (unpublished, undated thesis, Facultad de Derecho, Universidad de Costa Rica) (on file with author).

16. *See, e.g.*, CONST. COLOM. art. 58 (providing that the social function of land includes its ecological mission); CHILE CONST. art 19, § 24 (providing that the social function of property includes the conservation of the environmental patrimony); LEY DEL SERVICIO NACIONAL DE REFORMA AGRARIA BOLIVIA, art. 2, II; AGRARIAN CODE OF PANAMA, art. 68; LEY DE INFORMACIONES POSESORIAS, art. 7 (Costa Rica).

17. *See*, Puliksch, *supra* note 15, at 31-33.

18. *See id.* at 28 (citing Sala Primera de la Corte Suprema de Justicia, No. 80 de 13 H. 45 de 31 de Mayo de 1991, Ordinario de G.P.S.A. contra el Estado (Costa Rica)).

19. *Id.* at 29 (citing Tribunal Superior Agrario, No. 518 de las 14 H. del 24 de Julio de 1995 Procesal Interdictal de J.M.P. c/ C.S.A (Costa Rica)). The court held that to establish

is a lesser jurisprudential leap to the principle of *posesión ecológica*, premised on the ecological function of property, but subsumed within the social function.[20] What does appear to be retained, however, is the requirement of some form of affirmative care of the property "to maintain its equilibrium."[21]

The theory of *posesión ecológica* continues to evolve. Lawyers in Brazil have begun making the case for a new form of possession that reflects the special circumstances of Amazonian rubber tappers and other extractivists.[22] *Posee agroecologia*, Portuguese for agro-ecological possession, would confer title to forest dwellers who practice nontimber forest product extraction in the Amazon forest.[23] These forest dwellers exploit and alter the forest for both subsistence and commercial purposes, but in a way that is considered sustainable by conservation advocates.[24] As in other Latin American countries, they do not have title to the land which, in conformance with the agrarian law model, can be gained only through a demonstration of possession.

B. Civil Responsibility for Environmental Harm

Environmental lawyers have expressed renewed interest in the civil code as a tool for addressing environmental protection in Latin America.[25] Much like the Anglo-American common law retains its vigor in the face of a jurisprudence increasingly dominated by statutes, so, too, do analogous provisions of the civil code. To the extent that the pre-statutory civil law accesses the environment, it is typically dealt with

---

"*posesión agraria forestal*" the activity must include "maintaining roads, timber extraction and the natural regeneration of the forest." (translation by the author).

20. *Id.* at 65 (citing Sala Primera de la Corte Suprema de Justicia, No. 112 de las 15 H. 50 del 11 de Octubre de 1995 (Costa Rica)). The court stated that "[t]he economic-social function of property will also enter an ecological function."

21. *Id.* (citing Tribunal Superior Agrario, No. 557 de 13 H. 5 del 14 Agosto de 1992 (Costa Rica)) (indicating the court's reliance on tourism and wildlife ranching as examples of possessory acts).

22. *See* Jose Hedar Benatti, *Posse colectiva da terra: um estudio juridico sobre o apposamento de seringueiros e quilombolas*, *at* http://www.dhnet.org.br/direitos/sos/terra/benatti.html (last visited June 5, 2003).

23. *Id.*

24. *See, e.g.*, THOMAS T. ANKERSEN & GRENVILLE BARNES, INSIDE THE POLYGON: EMERGING COMMUNITY TENURE SYSTEMS AND FOREST RESOURCE EXTRACTION (forthcoming 2004), *available at* http://conservation.law.ufl.edu/pdf/extraction.PDF. For an excellent history of Amazon rainforest colonization see MARIANNE SCHMINK & CHARLES H. WOOD, CONTESTED FRONTIERS IN AMAZONIA (1992).

25. EFRAIN PÉREZ, DERECHO AMBIENTAL 116 (2000) (citing EULALIA MORENO TRUJILLO, LA PROTECCIÓN JURÍDICA-PRIVADA DEL MEDIO AMBIENTE Y LA RESPONSABILIDAD POR SU DETERIORO 85 (1991)).

through traditional civil code provisions that have common law analogs.[26] These are described through civil law doctrine in terms of the property-based categories of actions termed *relaciones de vecindad y servidumbres* and *la posesión y las acciones posesorias especiales* (e.g., nuisance and trespass and the public trust doctrine[27]) and *la responsabilidad civil extracontractual* (negligence and strict liability).[28]

Considerable attention has been directed to the formulation of civil environmental liability (*responsabilidad ambiental civil*) in Latin America as subjective, thus requiring fault (*responsabilidad subjetiva*), or as strict (*responsabilidad objetiva*), not requiring fault. This is based on clear language in most civil codes which provides that one who is negligent or imprudent has the responsibility to make the victim whole. Thus, for example, under the Costa Rican Civil Code, the general rule is that "any person who through *dolus* (intentional acts), negligence or lack of prudence, causes harm to another, is obliged to repair it, together with the *perjuicios*."[29] Like the common law action of strict liability for ultrahazardous activities,[30] civil code provisions establishing strict liability are based on the classification of certain things (*cosas*) that are particularly risky (*riesgo*).[31]

In the absence of civil liability provisions in specific statutes, these civil code provisions are often referred to,[32] and lawyers often argue over whether particular violations require fault. As a result, considerable scholarly writing has been produced concerning the need for the general

---

26. W. PAGE PROSSER ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 646-52 (5th. ed. 1984).

27. The closest analog to the common law public trust doctrine under the civil law system is "*dominio público*." *See* Byron Real-López, El Dominio Publico y El Public Trust Doctrine: Análisis Comparativo de los Sistemas en los Estados Unidos y en Latinoamérica (2000) (unpublished manuscript on file with the author and the University of Florida Conservation Clinic).

28. *See* PÉREZ, *supra* note 25, at 114-18.

29. CODE CIVIL [C. CIV] art. 1405 (Costa Rica) (translation by author). For similar language, see CODE CIVIL [C. CIV] art. 1910 (Mex.); CODE CIVIL [C. CIV] art. 2256 (Ecuador).

30. RESTATEMENT (FIRST) OF TORTS § 520 (1938) (restating the holding of *Rylands v. Fletcher*, L.R. 1 Exch. 265 (1866) (affirmed L.R. 3 H.L. 330 (1868))).

31. Article 1913 of the Civil Code of Mexico provides: "When a person makes use of mechanisms, apparatus or dangerous substances for the same, for the velocity it develops, for its explosive or inflammable nature, for the electrical current it conducts, that person is obliged to respond to the damage caused, although not done illegally or with the victim's demonstration that the damage is produced by fault or inexcusable negligence." (translation by author). *See also* C. CIV. art. 1113 (Arg.); C. CIV. art. 1913 (Mex.); CODE CIVIL [C. CIV.] arts. 104-107 (Cuba).

32. Diethell Columbus, *La Responsibilidad Extracontractual desde la Optica de la Protección Ambiental*, *at* http://ecoportal.net/articulos/respon.htm (last visited June 5, 2003); *Responsibilidad Civil por Daño Ambiental: Análisis Jurisprudencial*, *at* http://www.cyberambiental.com/legales/jurisprudencia.

"objectivization" of *responsabilidad* in environmental law,[33] sometimes pointing, by way of example, to the Superfund legislation in the United States.[34]

C. Standing Doctrine

Premodern civil law remedies share some similar constraints with their common law analogs in terms of their capacity to allow actions on behalf of the environment. At common law, the so-called "special injury" rule limits individual standing to bring causes of action defending public rights.[35] This constraint can also be found in civil law systems. The civil law's nearest terminological analog to the common law standing doctrine is referred to as "*la legitimación procesal*." This fundamental civil law precept implies that "only persons that encounter themselves in a determined relation with the action can be part of the process that resolves that action."[36] To address this infirmity in Colombia, a creative lawyer rescued a little known civil code concept originating in Roman law called the "*acción popular*" (popular action) that authorizes individuals to bring civil actions to protect group rights, sometimes referred to as *intereses colectivos* (collective interests) or *intereses difusos* (diffuse interests).[37] This civil action is available in those nations which share the code reforms authored by Andres Bello, a nineteenth-century Venezuelan scholar whose work influenced civil procedure in Chile, Colombia, Ecuador, Panama, and El Salvador.[38] The *acción popular* was popularized by Colombian legal scholar and public interest lawyer, German Sarmiento.[39] Sarmiento argued that two seemingly archaic provisions of the Bello Code, articles 1005 and 2359 of the Colombian Civil Code,[40] addressing the right of municipal residents to

---

33. *See* JORGE BUSTAMANTE ALSINA, DERECHO AMBIENTAL: FUNDAMENTACION Y NORMATIVA 151 (Albeledo-Perrot, Buenos Aires, Undated); RAUL BRAÑES, MANUAL DE DERECHO AMBIENTAL DE MEXICO 281 (2000).

34. ALSINA, *supra* note 33, at 189-90.

35. PROSSER ET AL., *supra* note 26, at 651.

36. PÉREZ, *supra* note 25, at 49 (citing J.R. DROMI, DERECHO SUBJETIVO Y RESPONSIBILIDAD PUBLICA (1980).

37. *See* GERMAN SARMIENTO PALACIO, LAS ACCIONES POPULARES EN EL DERECHO PRIVADO COLOMBIANO (Banco de la Republica ed., 1988)(on file with the author).

38. German Sarmiento, *Popular Actions and the Defense of the Environment in Colombia*, PROC. OF THE THIRD INT'L CONF. ON ENVT'L ENFORCEMENT (1994), *available at* http://www.inece.org/3rdvol1/pdf/sarm.pdf; *see also* C.CIV. art. 940 (Chile); C.CIV. art. 1012 (Ecuador); C.CIV. art. 129 (Pan.); C.CIV. art. 949 (El Sal.).

39. German Sarmiento Palacio, Las Acciones Populares y La Defensa del Medio Ambiente en Colombia 1-4 (unpublished paper on file with the author).

40. *See id.* at 7-8. Article 1005 of the Columbian Civil Code establishes the right of a municipality or any of its inhabitants to use roads, squares, and *public places*, and provides for

protect public goods are applicable to contemporary environmental law.[41] Sarmiento's scholarly writing convinced the Colombian Congress to expressly extend the *acción popular* to environmental matters.[42]

Sarmiento's public-interest-litigation NGO, Fundepublico, has successfully tested the *acción popular* in environmental litigation and Sarmiento has analogized it to statutory "citizen suits," a feature of U.S. public interest law.[43] Fundepublico's early *acción popular* cases involved contamination of rivers (public places) by polluting industries.[44] Subsequently, in 1991, the *acción popular* was incorporated into the Colombian Constitution.[45] To date it has not been extended to the environmental dimension in other Latin American Bello Code countries, although Brazil has also introduced the action, along with a related civil public action, in its 1988 Constitution.[46] This latter civil provision authorizes the public ministry to "promote civil or public action to protect social and public patrimony, the environment and other collective and diffuse interests."[47] These developments, along with developments in administrative law, have led commentators to observe that "in the jurisprudence of distinct countries there can be observed a tendency to attenuate the notion of interest."[48]

---

liability and compensation for damage to the same. Article 2359 creates an action for "contingent damages" based on a "threat to unspecified persons."

41. SARMIENTO, *supra* note 37, at 60.

42. LEY 9 art. 8 (1989) (Colom.); DECRETO 2303 DE 1989 art. 118 (1989) (Colom.). The rejuvenation of the *acción popular* and its extension to environmental law is reviewed by the Colombian Constitutional Court in Sentencia No. T-469/94, the first instance where it is applied in its constitutional dimension.

43. Sarmiento, *supra* note 39, at 2; Las Acciones Populares y La Defensa del Medio Ambiente en Colombia (unpublished paper on file with the author). *See generally* MICHAEL AXLINE, ENVIRONMENTAL CITIZEN SUITS (1993).

44. Some of Fundepublico's most important cases are summarized, in Spanish, *at* http://www.elaw.org.

45. CONST. COLOM. art. 88; *see* Corte Constitucional [Constitutional Court] Sentencia No. T-469/94 (Colom.). One commentator has complained that the broad standing conferred by the *acción publico*, coupled with the broad environmental rights language of the constitution, has led to the abuse of this action for political motives. *See* Luis Fernando Macias G., *Acciones Populares y Medio Ambiente: Un Nuevo Paradigma de Militancia Jurídica*, 7 MEDIO AMBIENTE Y DERECHO 1 (2002).

46. C.F. art. 5, LXXIII (Braz.). *See generally* CLOVIS BEZNOS, ACAO POPULAR E ACAO CIVIL PUBLICA (1989) (on file with author).

47. C.F. art. 129, III (Braz.).

48. Pérez, *supra* note 25, at 110.

D. Seeking Natural Justice: The Common Wealth of the Common Law

In the English-speaking Caribbean, the first (and reportedly only) civil environmental law case in Jamaica was brought under theories of nuisance and negligence on behalf of a class of Kingston residents whose tin roofs were being harmed by air pollution from bauxite mines.[49] Commonwealth nations frequently look to England for supporting jurisprudence, and have been known to look beyond England to other members of the British commonwealth such as Australia, Canada, and India, as well as to the United States.[50] This global access to jurisprudence presents a wealth of possibilities.

Standing, or *locus standi* as it is referred to in the Commonwealth Caribbean, draws substantially from British and U.S. law, although the Caribbean is beginning to develop its own distinctive case law. Caribbean law is similar to English and U.S. law with respect to the traditional "special injury" rule governing private actions such as nuisance, trespass, and strict liability.[51] Moreover, Caribbean courts have generally adopted a "sufficient interest" test that controls access to courts in public interest litigation contesting governmental decisions.[52] The sufficient interest test appears to rule out purely associational standing based on an organization's general interest in protecting the environment. One commentator, however, finds hope in recent British decisions relaxing this hurdle.[53] Public interest standing in the Caribbean Commonwealth received a broad construction in a 2000 Cayman Islands case. In *National Trust for the Cayman Islands, Burns Conolly v. The Planning Appeals Tribunal*, an appeals court denied both an individual and an environmental group *locus standi* as aggrieved persons to appeal from an administrative agency's decision to grant development approval

---

49. *See* Alcoa Minerals of Jamaica Inc. v. Herbert Broderick [1996], Supreme Court of Appeal No. 15/95 (Jamaica).

50. Interestingly, final appeal in the Commonwealth Caribbean nations remains to the Judicial Committee of the Privy Council of the House of Lords in England. However, there is a strong, but still controversial, movement in the Caribbean to create a common Caribbean appeals court with final appeal authority. *See The Caribbean Court of Justice: What It Is, What It Does* (Apr. 17, 2000), *available at* http://www.caricom.org/ccjq&a.htm.

51. *See* Winston Anderson, Enforcement and Compliance of Environmental Law in National Courts: The Role of the Judiciary 5 (unpublished, undated manuscript on file with the author) (citing both British and Caribbean authorities). Winston Anderson is a member of the Faculty of Law of the University of West Indies and Acting Executive Director of the Caribbean Law Institute Centre in Barbados.

52. *Id.* at 5-8 (citing cases from Antigua and Barbuda and Barbados).

53. *Id.* at 8 (citing R. v. Pollution Inspectorate ex p. Greenpeace (No.2) (1994) (U.K.); R. v. Secretary of State for Foreign Affairs (1995) (U.K.)).

to a large tourism facility on environmentally sensitive lands.[54] The appeals court sided with the developer and held that under principles of *locus standi* aggrieved persons were only those actually affected in a material, legal, or pecuniary sense. The appeals court further found that the national NGO and the individual were in no different position than the public as a whole. However, the Grand Court, the nation's highest court, took a much broader view. Writing for the majority, Justice Sanderson utilized the jurisprudential principle of "natural justice" to find that the petitioners had been denied an opportunity to present informed objections concerning the development to the administrative tribunal. In subsequent commentary, Justice Sanderson made the case for increasing the judiciary's role in ensuring access to administrative tribunals in order to "allow and encourage environmental groups to have their voice at the permission granting or planning stage."[55]

E. Ecological Easements: Private Conservation and Emerging Property Instruments

Property law represents another rich source of environmental jurisprudential innovation that has benefited from trans-systemic knowledge sharing. Spurred by U.S. land conservation NGO influences, increasing wealth, and the development of nature-based tourism, the concept of private conservation has taken hold in Latin America.[56] While this movement has many manifestations, the concept of conservation easements, or *servidumbres ecológicas*, represents the most interesting jurisprudential development.[57] *Servidumbres ecológicas* developed initially in Costa Rica with the first easement registered in 1992.[58] The U.S. NGO The Nature Conservancy, a champion of private land conservation in the United States, recognized the potential of

---

54. Justice Dale Sanderson, Q.C., The Role of the Courts in Dealing with Environmental Activism 7-10 (undated, unpublished manuscript on file with author) (citing National Trust for the Cayman Islands, Burns Conolly v. The Planning Appeals Tribunal, Cause No. 368/3000 and 378/2000 (Sanderson, J.) (Cayman Is.)).

55. *Id.* at 8.

56. *See generally* IAN BOWLES ET AL., ENCOURAGING PRIVATE SECTOR SUPPORT FOR BIODIVERSITY CONSERVATION: THE USE OF ECONOMIC INCENTIVES AND LEGAL TOOLS (Conservation Int'l Policy Papers 1996). In Latin America, the Costa Rican environmental law NGO CEDARENA and its offshoot CEDARENA Land Trust, have been at the forefront of this movement. *See* CEDARENA Land Trust, *at* http://www.cedarena.org/landtrust/ (last visited June 5, 2003).

57. *See* CARLOS M. CHACÓN, LAS DISPOSICIONES LEGALES COSTARRICENSES SOBRE LAS SERVIDUMBRES ECOLÓGICAS 3-5 (Cedarena Land Trust ed., 2002).

58. *Id.* at 3. The author traces the jurisprudential origins of the concept to a 1987 law review article entitled *Servidumbres Personales de Interés Comunitario*, XI REVISTA JUDICIAL 85 (1987).

conservation easements and has championed their use throughout Latin America.[59]

Jurisprudential analogies are easy because the property law basis for common law easements and civil law *servidumbres* derives from the same Roman law roots.[60] Both common and civil law servitudes traditionally shared the Roman law requirements of a dominant estate (*fundo dominante*) and serviant estate (*fundo serviante*), with the dominant estate representing the estate benefiting from conservation of the serviant estate.[61] In addition, Roman law required that the two estates be appurtenant. The easement in gross developed in the U.S. common law to allow the transfer of an easement to a person (natural or corporate) rather than to the dominant estate.[62] However, common law courts remain reluctant to permit the easement in gross to run with the land.[63] Both the civil law and the Commonwealth common law have followed the common law's reluctance to transfer servitudes to persons rather than property, a seemingly crucial development necessary for conservation easements to flourish.[64] In the United States, conservation easement statutes have, in large part, supplanted the traditional common law, in part to provide greater certainty with regard to the confused state of the common law.[65] The easement in gross is expressly recognized in most statutes, and NGOs and public agencies may now substitute themselves for the dominant estate without the burden of owning adjacent property. Statutes also create a variety of economic incentives for easement donation. As a result, a conservation land trust movement flourishes in the United States.[66]

---

59. Ecuador claims to be the first country in South America to have created a conservation easement, which occurred in 1989. INSTRUMENTOS LEGALES DE CONSERVACIÓN MANUAL DE SERVIDUMBRES ECOLÓGICAS (1999). Other countries where conservation easements have apparently been registered include Paraguay, Mexico, Honduras, and Belize.

60. *See* WILLIAM W. BUCKLAND & ARNOLD D. MCNAIR, ROMAN LAW AND THE COMMON LAW: A COMPARISON IN OUTLINE 128 (1952).

61. *See, e.g.*, C.CIV. art. 370 (Costa Rica) (stating that "[s]ervitudes cannot be created in favor or charge of a person"). *See* Caroline Amilien, Conservation Easements: A Comparative Study of Common Law and Civil Law Jurisdictions 1-6 (December 1995) (on file with author).

62. *See* Andrew Dana & Michael Ramsey, *Conservation Easements and the Common Law*, 8 STAN. ENVTL. L.J. 1, 2 (1989).

63. *See* John Walliser, *Conservation Servitudes*, 13 NAT. RESOURCES & ENVTL. L. 47, 61-62 (1997).

64. *See* Amilien, *supra* note 61, at 6.

65. *See* Walliser *supra* note 63, at 115-16.

66. According to the nonprofit organization Land Trust Alliance, there are 1200 conservation land trusts in the United States holding more than 2.5 million acres of conservation easements. *See* The Land Trust Alliance, *National Land Trust Census*, http://www.lta.org/aboutlta/census.shtml (Sept. 12, 2001).

Civil law and economic constraints continue to hamper the development of conservation easements in Latin America and the Caribbean. However, while easements in gross are not recognized in the civil law, the traditional notion of appurtenancy of the estates has been relaxed in some civil law jurisdictions.[67] There must still be two properties, but they need not be contiguous. This has allowed enterprising lawyers in Costa Rica to make the novel argument that an ecological connection between the two estates represents a sufficient connection to justify granting the *servidumbre* under traditional civil law doctrine.[68] This theory has benefited the development of wildlife corridors, a major component of Costa Rican conservation policy. At the same time, civil law countries are also looking to statutes to cure the shared defects presented by the civil code and the common law.[69]

IV. REVOLUTIONARY DEVELOPMENTS: THE CONSTITUTIONALIZATION OF ENVIRONMENTAL LAW

Environmental law has evolved in Latin America to become a comprehensive statute-based framework, grounded in constitutional law, that addresses all aspects of modern environmental law. Contemporary environmental law in the region is often expressed through elaborate and encompassing framework laws,[70] which may or may not have a considerable body of associated subsidiary laws and regulations. Both Latin American and U.S. authors have described the increasingly complex and sophisticated nature of environmental legislation in the region.[71] Environmental licensing, environmental impact assessment, and

---

67. For example, France. *See* Amilien, *supra* note 61, at 36; AGUSTÍN ATMELLA, MANUAL DE INSTRUMENTOS JURÍDICOS PRIVADOS PARA LA PROTECCIÓN DE LOS RECURSOS NATURALES (1995).

68. CHACÓN, *supra* note 57, at 7.

69. Draft legislation (*proyectos de leyes*) creating an easement in gross has been introduced in Costa Rica and Ecuador. *See* Proyecto de Ley, Promoción de la Conservación en Tierras Privadas, Expediente No. 14,924 (Sept. 5, 2002) (Costa Rica), *available at* http://www.racsa.co.cr/asamblea/proyecto/14900/14924.doc; Proyecto de Ley de Biodiversidad, art. 43 (Ecuador).

70. According to one regional environmental law scholar, 17 of the 20 Latin American nations (excluding the English-speaking Caribbean) in the region have enacted framework environmental legislation. Dr. Raul Brañes, Avances y Retos del Derecho Ambiental en la Región Latinoamericana: Organizaciónes No Gubermentales y Cooperación Internacional 3 (paper presented at the Fifth Reunion of the Environmental Law Grantees of the MacArthur Foundation, on file with the author). Most of the region's existing specific constitutional environmental provisions are collected at *Protección del Medio Ambiente*, *at* http://www.georgetown.edu/pdba/Comp/Ambiente/ambiente.html (last visited June 5, 2003).

71. *See, e.g.*, Brañes, *supra* note 70, at 3; Lila Katz de Barrera-Hernandez & Alastair R. Lucas, *Environmental Law in Latin America and the Caribbean: Overview and Assessment*, 12 GEO INT'L ENVTL. L. REV. 207, 215-17 (1999). In addition, there is an emerging body of treatises

wildlife and wetlands protection are common features of most of the region's body of statutory environmental law. More recent developments include community right to know statutes, legislation governing access to genetic resources, protection of traditional knowledge, and water resources legislation. Political and administrative decentralization (*desconcentración*) is becoming increasingly important to regional environmental policy development. Commentators have also pointed out weaknesses in these frameworks, foremost among these being inadequate or inconsistent implementing regulations, lack of enforcement, jurisdictional overlap, and inadequate funding.[72] Rather than repeat a review of environmental legislation in the region, this section addresses the most interesting and compelling development that has distinguished the region's environmental law development: the constitutionalization of environmental protection.

In Latin America, environmental rights have been expressed in most of the region's constitutions,[73] a phenomenon that can be traced back to the 1972 Stockholm Conference on Environment and Development where the linkage between human rights and the environment began to evolve.[74] Some countries have devoted whole chapters of their constitutions to environmental rights.[75] Moreover, lawyers are asserting the right and courts are building constitutional jurisprudence around it. This is in marked contrast to the United States, with its alleged reluctance to amend its constitution, and where the idea of an enforceable constitutional environmental right has been limited to little more than scholarly speculation.[76] Despite their European civil law roots, Latin American and Caribbean nations have generally looked to the United

---

that treat environmental law in the region thematically and comparatively. *See* ALSINA, *supra* note 33, at 189; PÉREZ, *supra* note 25, at 29-37.

72. de Barrera-Hernandez & Lucas, *supra* note 71, at 227-33.

73. CONST. ARG. art. 41; C.F. art. 5, LXXIII (Braz.); CHILE CONST. art. 19(8); CONST. COLOM. art. 79; COSTA RICA CONST. art. 50; CUBA CONST. art. 27; ECUADOR CONST. art. 23; EL SAL. CONST. art. 117; GUAT. CONST. art. 97; GUY. CONST. art. 25; HAITI, CONST. tit. I, ch. 2, art. 52-1, art. 253-58; HOND. CONST. arts. 145, 172-73; CONST. tit. 1, ch. 1, art. 4, ¶ 4 (Mex.); NICAR. CONST. art. 60; PAN. CONST. arts. 114-15; PARA. CONST. ch. 1, § 2, arts. 7, 38; PERU CONST. art. 2, ¶ 22; URU. CONST. art. 47; VENEZ. CONST. art. 127.

74. PÉREZ, *supra* note 25, at 32-34.

75. *See* Capitulo VI (Do Ambiente) of Titulo VIII Da Ordem Social (Braz.); articles 253-258, title I, chapter II (The Environment) (Haiti); proposed *Proyecto de Ley* (Costa Rica).

76. For a good discussion of the status of constitutional environmental rights in the United States and in the individual states, see WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW 62-67 (2d ed. 1994 & Supp. 1999).

States for constitutional inspiration,[77] a consideration which has influenced constitutional jurisprudence, particularly the protection of fundamental rights. This has become especially significant with the recent emergence of constitutional courts with the authority to interpret constitutions and create binding precedent.

A. Antecedents: The Chacón *Case in Costa Rica and the Implied Right to a Healthy Environment*

In a landmark case in the region's jurisprudence, the Costa Rica Constitutional Court considered constitutional environmental rights even before that country's constitution directly expressed the right. In Voto No. 3705-93, the constitutional court took jurisdiction over a case involving a municipal government's failure to regulate the dumping of debris along the shore of the Virilla River.[78] The case is remarkable for a number of reasons. First, the court accepted jurisdiction based on a letter submitted to it by a minor child, Carlos Roberto Mejia Chacón.[79] The court noted that constitutional rights should not be subject to formulaic pleading requirements and considered the letter to represent a *recurso de amparo* sufficient to find jurisdiction.[80] Secondly, the court considered the letter to allege an infringement of the child's "right to life" under article 21 of the Costa Rican Constitution,[81] the first time in regional jurisprudence that this fundamental individual right had been expressly found to encompass environmental rights. The court next addressed the standing of the minor child to bring the action. Based on the profound nature of the right allegedly infringed—an environmental right—the court articulated an expansive and novel interpretation of civil constitutional law.[82] The court rejected the narrow standing of individuals to represent *intereses difusos* and adopted an interpretation that allows an individual who is injured in a similar manner to others in a class of injured persons to maintain the action.[83]

---

77. PÉREZ, *supra* note 25, at 29; *see also* Luz Estrella Nagle, *Evolution of the Colombian Judiciary and the Constitutional Court*, 9 IND. INT'L & COMP. L. REV. 59, 89-90 (1995) (discussing the U.S. influence on Colombian judicial activism).

78. Sala Constitucional de la Corte Suprema de Justicia [1993], Voto No 3705-93 (Costa Rica).

79. *Id.*

80. See *infra* note 92 for a description of the *amparo* action in civil law.

81. COSTA RICA CONST. art. 21.

82. Sala Constitucional de la Corte Suprema de Justicia [1993], Voto No. 3705-93 (Costa Rica).

83. The court noted that this trend had already begun to take place in the administrative law arena as a means of giving citizens greater access to governmental processes. *Id.*

The significance of the *Chacón* case as jurisprudence in Costa Rica has been diminished by the creation of an express environmental right in the Costa Rican Constitution,[84] as well as the express provision of citizen standing to invoke the right.[85] However, its historical importance, as well as its potential jurisprudential significance in other jurisdictions, remains. Indeed, anecdotal evidence suggests that the case served as the basis for arguments before the Supreme Court of India, which also found the right to a healthy environment implied in its right to life guarantees.[86]

B. Constitutional Environmental Rights: A Closer Look

Despite the fact that most countries now explicitly address the environment through constitutional guarantees, the legal force and jurisprudential value of these constitutional provisions varies greatly—ranging from little more than hortatory aspiration to enforceable positive law. Most commentators to date have focused most of their attention on the language of constitutional environmental guarantees.[87] Less attention has been focused on how these rights are made meaningful through the judicial system, thus distinguishing between those constitutional provisions which have the potential to create precedential jurisprudence, and those which merely describe generalized aspirations and state duties.[88]

Several factors contribute to the difference in the jurisprudential efficacy of national constitutional environmental rights in Latin America and the Caribbean. These include the force and clarity of the language creating the right, the extent to which the right can be characterized as a "fundamental" and "subjective right" (*derecho subjetivo*), a "collective right" (*derecho collectivo*), or both under the national legal system, and whether the right can be interpreted in a manner that has precedential

---

84. Article 50 was introduced into the Costa Rica Constitution in 1994, one year after the *Chacón* case was decided. COSTA RICA CONST. art. 50 (as amended by Article 1, Act No. 7412, June 3, 1994).

85. *See infra* notes 89-95 and accompanying text.

86. Personal Communication with Dr. Rafael Gonzalez Ballar, Decano, Facultad de Derecho, Universidad de Costa Rica. The knowledge sharing mechanism through which this jurisprudence was transferred was the Environmental Law Alliance Worldwide (E-LAW). *See* Environmental Law Alliance Worldwide, *at* http://www.elaw.org (last visited June 5, 2003).

87. For a good review of the collective environmental constitutional jurisprudence in Latin America, see BRAÑES, *supra* note 33, at 65-105; ADRIANA FABRA & EVA ARNAL, REVIEW OF JURISPRUDENCE ON HUMAN RIGHTS AND THE ENVIRONMENT IN LATIN AMERICA 2-6 (Joint UNEP-OHCHR Expert Seminar on Human Rights and the Env't, Background Paper No. 6, 2002).

88. *But see* Carl Bruch et al., *Constitutional Environmental Law: Giving Force to Fundamental Principles in Africa* 26 COLUM. J. ENVTL. L. 131, 187-201 (2001) (discussing judicial review in both common law and civil law jurisdictions).

value. It is in those countries where the right enjoys plain and unambiguous language, where the right is either collective or both collective and fundamental, and where there is direct procedural access to a court with the power to interpret the scope of the right, that the right has reached its greatest potential. These underlying systemic requirements must be coupled with the presence of litigious individuals or NGOs willing to assert environmental rights in the courts. The number of countries where all of these factors have converged represents a substantially smaller subset of those countries possessing a constitutional basis for environmental rights. Several of these are discussed below.

Article 50 of the Costa Rican Constitution provides "[e]ach person has the right to a healthy and ecologically balanced environment. For this, it is legitimate to denounce those acts that infringe on this right and to claim reparation for the damage caused."[89] In the terms of the factors discussed above, this provision and its juridical context is significant for several reasons. To begin with, by including the term "ecologically balanced" (*ecológico equilibrado*) it removes any opportunity to interpret the right to a "healthy" environment narrowly to one which can be enforced only where human health is implicated.[90] The right is incorporated into the Costa Rican Constitution in the title on social or collective rights,[91] but individuals may assert it. The second sentence of article 50 explicitly creates a right of action. Actions to enforce the article 50 right in Costa Rica can be "as applied" through the *amparo* action,[92] and facially through the *acción de inconstitucionalidad*.[93] As a matter of procedural law, both can be brought directly to Sala IV (the

89. COSTA RICA CONST. art. 50.

90. *See* John Lee, *The Underlying Legal Theory to Support a Well-Defined Human Right to a Healthy Environment as a Principle of Customary International Law*, 25 COLUM. J. ENVTL. L. 283, 287-301 (2000). Other nations which include the term "ecological equilibrium" include Brazil (Article 225) and Paraguay (Article 7). BRAZ. CONST. art 225; PARA. CONST. art. 7.

91. COSTA RICA CONST. tit. V.

92. The constitutional *amparo* action is a product of Mexican jurisprudence that has been adopted in much of Latin America. Influenced in its origin by U.S. civil rights law, the *amparo* was created to provide a simple and direct action to protect individual liberties. As such it has historically been regarded as an action to redress specific governmental harm to an individual's fundamental rights that is not available to assert collective rights or to strike down legislation. *See* Hector Fix-Zamudio, *Breve Introducción al Juicio de Amparo Mexicano*, *in* ENSAYOS SOBRE EL DERECHO DE AMPARO 1, 1-96 (1999). An English version of this essay can be found at Carl E. Schwartz, *A Brief Introduction to the Writ of Amparo*, 9 CAL. W. L. REV. 306 (1979).

93. Both the *amparo* and the *acción de inconstitucionalidad* procedures are addressed through the Law of Constitutional Jurisdiction. *See* COSTA RICA CONST. art. 29-65 (*amparo*), art. 73-95 (*inconstitucionalidad*). *See* Robert S. Barker, *Judicial Review in Costa Rica: Evolution and Recent Developments*, 7 SW. J. L. & TRADE AM. 267, 279-82 (2000).

Fourth Chamber), the constitutional court created in 1989.[94] As a consequence, there have been a number of cases resolved by the constitutional court based upon an alleged governmental failure to protect environmental rights.[95]

Article 19 of the Chilean Constitution guarantees every person "the right to live in an environment free from contamination," and imposes a duty on the state to "preserve nature" and protect the right from infringement. This right was first tested in a case involving the validity of an environmental impact assessment concerning a proposal to log old growth forests and construct a chipping mill. In the *Trillium* case, the Chilean Poder Judicial addressed the standing question and described the Chilean environmental right as a "human right" having a "double character" as "subjective public law" and "collective public law."[96] As subjective public law, the right is enforceable by harmed individuals and as collective public law it may be enforced in the interest of everyone for arbitrary and illegal acts or omissions. The procedural device to bring the constitutional claim in Chile is referred to as the *recurso de protección*, somewhat analogous to the *tutela* in Colombia or the *amparo* in Costa Rica.[97] In *Trillium*, the court upheld the standing of the environmental groups to challenge the action and found the environmental impact assessment to be inadequate as a matter of law.

However, the Chilean constitutional language "*libre de contaminación*" ("free from contamination") seems even less likely than "healthy environment" to be subject to a construction that might implicitly encompass biological conservation for its own sake. In a case subsequent to the *Trillium* decision, a Chilean appellate court found that the assertion of the right is limited to violations that affect human life or health.[98]

Colombia has enjoyed an active constitutional environmental jurisprudence since establishing the right to a healthy environment in its 1991 constitution. The Colombian right states "[e]very individual has

---

94. *See* Barker, *supra* note 93, at 279-82.

95. *See, e.g.*, Expediente 98-003684-0007-CO, Resolución 1999-01250 (Costa Rica) (finding legislation authorizing annual harvest of sea turtles a violation of article 50); Expediente 01-011865-0007-CO, Resolución 2002-2486 (Costa Rica) (finding government authorization to harvest a species of trees relied upon by the endangered green parrot unconstitutional under article 50).

96. *Trillium* Case, Poder Judicial, No. 2.732-96 (1997) (Chile), *available at* http://www.elaw.org/resources/text.asp?ID=156.

97. CHILE CONST. art. 20.

98. Corte de Apelaciones de Puerto Montt, Fojas 713 (Aug. 16, 1999), *available at* http://www.elaw.org. Ecuador also shares the "free from contamination" conception of the right. ECUADOR CONST. art. 19.

the right to enjoy a healthy environment."[99] This provision also guarantees community participation in development decisions that may impact it.[100] Colombian jurisprudence, however, does not treat the environmental right as fundamental.[101] Hence, to maintain an individual action for specific harm, the right to a clean environment must be bundled with a fundamental right, such as the right to life or health.[102] In such cases, the action is maintained through the *tutela* action,[103] which under Colombian jurisprudence is similar to the more widely used *amparo* action. However, as noted above, Colombia has constitutionalized its *acción popular*,[104] which serves as a liberal standing device to defend collective rights.[105] Largely as a result of the efforts of the public interest litigation NGO Fundepublico, there have been a number of decisions from the Constitutional Court of Colombia interpreting the Colombian right to a healthy environment and related fundamental rights.[106]

The relative juridical force of the environmental right of the constitutions of Costa Rica and Colombia, and to a lesser extent, Chile, can be readily contrasted with the relatively weak language of the Mexican constitution which provides "each Person has a right to an environment adequate for their development and well-being."[107] The term "adequate" would seem decidedly more elusive and equivocal than its counterpart, "healthy." Mexico's provision also falls within its title concerning individual guarantees, thus limiting redress to harmed individuals and, in the absence of broad judicial construction, removing it as an avenue for addressing collective rights and striking down legislation. Moreover, the procedural device to assert the individual right in Mexico, the *amparo*, has no precedential value in subsequent cases. Commentators have not been sanguine about the prospects for an expansive interpretation of the Mexican right.[108]

---

99. CONST. COLUM. art 79.

100. *Id.*

101. Constitutional Court of Colom., Sentencias 111/95 and T.1666/2000.

102. *See, e.g.*, Constitutional Court of Colom., Sentencias T-126/94; T-469/94; T-095/97; T-194/99.

103. CONST. COLOM. art. 86.

104. *Id.* art. 88.

105. Law 472 (1998) (Colom.).

106. A brief description of some of these cases can be found at E-Law, *at* http://www.elaw.org (last visited June 22, 2003).

107. CONST. art. 4 (Mex.). Peru also possesses similar language of adequacy. PERU CONST. art. 2.

108. *See* Marisela Cifuentes López & Saul Cifuentes López, *El derecho constitucional a un medio ambiente adecuado en México*, 6 MEDIO AMBIENTE Y DERECHO: REVISTA

In the commonwealth Caribbean, Jamaica has proposed language within a draft "Charter of Fundamental Rights and Freedoms" that would appear linguistically problematic. It guarantees "the right, *compatible with sustainable development*, to enjoy a healthy and productive environment free from the threat of injury or damage from environmental abuse and degradation of the ecological heritage."[109] The balancing test with "sustainable development" that is explicitly set up with the articulation of the right dilutes its force. The draft charter provides for redress by persons directly harmed (for example, as applied); or by persons and public or civic organizations (with leave of the supreme court) to facially challenge the constitutionality of legislative acts or decrees.[110] However, assertion of the right requires leave of court only on a finding that nonconstitutional remedies are inadequate.[111]

Cuba's environmental constitutional language also appears relatively weak and is framed in terms of state duties (*deberes*).[112] It does not appear to confer defensible individual or collective rights. The provision falls within Chapter I, *Political, Social and Economic Foundations of the State*, rather than Chapter VII which provide for "rights, duties and fundamental guarantees." Moreover, Cuba is unique among the region's nations in terms of subordinating the judiciary to the legislative and executive branches as a matter of constitutional law.[113] This would seem to make striking down legislation on constitutional grounds virtually impossible. Interestingly, and perhaps uniquely, however, the Cuban environmental article imposes an affirmative duty on citizens to protect the environment.[114]

V. INSTITUTIONS FOR SHARING KNOWLEDGE AND SHARED JURISPRUDENCE

Over the last ten years the mechanisms for sharing emerging developments in environmental law in Latin America and the Caribbean have grown increasingly diverse and sophisticated. During this same time, the Internet evolved into a robust information dissemination tool

---

ELECTRONICA DE DERECHO AMBIENTAL 1, 1-12 (2000), *available at* http://www.cica.es/aliens/gimadus/Cifuentes.html.

109. Draft Charter of Fundamental Rights and Freedom, Chapter III, (3)(l) (Jam.) (on file with the author).

110. *Id.* at (17)(1)-(2)

111. *Id.* at (17)(4).

112. CUBA CONST. art. 27.

113. CUBA CONST. art. 121 (1992); *see also* Michael B. Wise, *Cuba and Judicial Review*, 7 SW. J. L. & TRADE AM. 247, 258-61 (2000).

114. *See* CUBA CONST. art. 27.

whose significance in fostering jurisprudential knowledge sharing cannot be overstated. The post-Rio convergence of environmental law and the Internet with democratic reform movements already under way in the region has dramatically hastened the pace of innovation in environmental law. The United States, with its thirty-year history of domestic environmental law has served as both an inspiration and a model, though many would now argue that the United States no longer exerts an intellectual leadership role in developing environmental law.

The number and range of environmental law organizations and networks in Latin America and the Caribbean has expanded to reflect this diversity. There are now networks of governmental and nongovernmental organizations and there are even networks of networks. Intergovernmental organizations promoting environmental law development include the Organization of American States,[115] the United Nations Environment Programme,[116] and the IUCN/World Conservation Union Environmental Law Commission.[117] These organizations maintain libraries and data bases that foster information sharing.

Nongovernmental public interest law organizations and networks have also proliferated. The largest and oldest of the networks is the Environmental Law Alliance Worldwide (E-LAW),[118] a horizontal alliance of public interest advocates of global scope. E-LAW was the first environmental law organization to champion the Internet as its primary tool for information sharing. Many transnational and transsystemic jurisprudential developments, including some of those discussed in this Article, can be traced to the E-LAW network. The *Alianza Interamericana para la Defensa del Ambiente* (AIDA) represents another interesting model. More than a network, it is a U.S. incorporated NGO affiliated with the U.S. NGO Earthjustice, whose members are made up of separately incorporated Latin American environmental law NGOs with a regional mission to pursue cases and protect resources that have a transnational effect.[119] In Central America, another such model, the *Red de Organizaciones No Gubermentales de Derecho Ambiental*

---

115. *See* Inter-American Forum on Environmental Law, *at* http://www.oas.org/usde/fida.htm (last visited June 22, 2003).

116. *See* Unidad de Derecho Ambiental, *Asistencia Técnica*, *at* http://www.rolac.unep.mx/deramb/esp/ (last visited June 5, 2003).

117. *See* IUCN, *Commission on Environmental Law—Overview*, *at* http://www.iucn.org/themes/law/cel01.html (last modified Mar. 6, 2003). The IUCN/World Conservation Union is a unique entity whose membership is both governmental and nongovernmental.

118. *See* Environmental Law Alliance Worldwide, *at* http://www.elaw.org (last visited June 5, 2003).

119. *See* AIDA, *at* http://www.aida2.org (last visited June 5, 2003).

(RODA), developed around the shared theme of protecting the "Mesoamerican Biological Corridor" and to promote environmental law regionally.

These institutions have all been nurtured by development agencies and private foundations. Most significant among these has been the John D. and Catherine T. MacArthur Foundation, which has maintained a ten-year effort to promote public interest environmental law in Latin America and the Caribbean.[120]

Despite these advances and the robust intellectual energy surrounding them, environmental law sources and scholarship remains uneven. Much is made of the fundamental distinction between the common law doctrine of *stare decisis*, with its emphasis on judicial law making, and the civil law aversion to the same. Yet it seems clear that this distinction is blurring. Perhaps just as important, however, is the relative ease with which decisions at all judicial levels can be systematically reported, cataloged, and shared. While these decisions do not create "precedent" in the way common law lawyers are accustomed to thinking, they are considered jurisprudence and, as such, have increasingly persuasive value.[121] Civil law judges must be aware that more lawyers are reading the opinions they are writing. The case style is entering the lexicon of civil environmental law making. Ready access to reporting systems remains, however, ad hoc and unregulated, making research difficult and uneven.

Environmental law education in academic fora in the region has lagged behind the pace of developments in environmental law fostered by the professional advocacy community.[122] Environmental law is just beginning to be recognized as a discrete discipline worthy of concentrated curricular development and scholarship.[123]

---

120. *See* MacArthur Foundation, *at* http://www.macfound.org (last visited June 5, 2003).

121. *See* John Bell, *Comparing Precedent*, 82 CORNELL L. REV. 1243, 1243-78 (1997) (reviewing D. NEIL MACCORMACK & ROBERT S. SUMMERS, INTERPRETING PRECEDENTS: A COMPARATIVE STUDY (1997)); Maria Luisa Murillo, *The Evolution of Codification in the Civil Law Legal Systems: Towards Decodification and Recodification*, 11 J. TRANSNAT'L L. & POL'Y 163, 173-74 (2001).

122. For an excellent comparative critique of the nature of Latin American and U.S. legal education, see Richard J. Wilson, *The New Legal Education in North and South America*, 25 STAN. J. INT'L L. 375 (1989).

123. In the United States, law schools are the repositories of jurisprudence, even if the courts are the primary mechanism for its development. Even law schools that do not offer a specialized environmental curriculum regularly offer three or four courses in environmental and land-use law. Those that do offer specialized curricula may have as many as eight to ten basic courses, complemented by skills training opportunities through environmental law clinics, field courses, and student organizations. Specialized environmental policy institutes centered in law

Curricular change in legal education in Latin America is slow and cumbersome, making it difficult to introduce new courses into already crowded schedules.[124] Nonetheless, many countries now have at least one significant treatise in environmental law.[125] These treatises (*tratados*) and recent academic scholarship reflect the growing maturation and sophistication of environmental law from the early years where texts were often little more than compilations of legislation. Despite these encouraging developments, an informal survey over the Internet and through colleagues yielded few academic programs devoted to environmental law in the region,[126] and two functioning Spanish language journals devoted exclusively to environmental law, none from within the region.[127]

Indeed, even in Costa Rica, which many view as a laboratory for the development of environmental policy, and which boasts at least three environmental law NGOs, environmental law has gained only a small foothold in the undergraduate law curriculum. One- and two-year postgraduate programs (*maestrías*) abound in the region, but few are subject matter specific to environmental law. On an encouraging note, the IUCN Environmental Law Commission recently announced a partnership with the *Sociedad Peruana de Derecho Ambiental* (SPDA) and the Catholic University of Peru to establish an environmental law "Center of Excellence" in Lima, Peru.[128]

---

schools and environmental law journals staffed by students are a common feature of U.S. law schools.

124. *See* Wilson, *supra* note 122, at 382-84; John Henry Merryman, *Legal Education There and Here: A Comparison*, 27 STAN. L. REV. 859, 869-70 (1975).

125. *See* BRAÑES, supra note 33, at 285; PÉREZ, *supra* note 25, at 110; Alsina, supra note 33, at 151.

126. The University of Costa Rica, the premier law school in the region, offers a master's degree in environmental and agrarian law, reflecting a curriculum still tied to agrarian doctrinal roots. *See* http://cariari.ucr.ac.cr/%7Ederecho/. Graduate environmental law programs were also found in private law schools in Colombia and Panama.

127. Medio Ambiente y Derecho: Revista Electrónica de Derecho Ambiental, *available at* http://www.cica.es/aliens/gimadus/ (last visited June 5, 2003). This electronic journal is published under the auspices of the law school at the Universidad de Sevilla, Spain. *See also* Revista de Derecho Ambiental, *available at* http://www.accesosis.es/negociudad/rda/informacion.htm (last visited June 5, 2003). The United Nations Environmental Programme's Regional Office for Latin America and the Caribbean launched a regional journal in 1994, but it lasted only one year. *See* Unidad de Derecho Ambiental, *at* http://www.rolac.unep.mx/deramb/esp/Publica/publica.htm (last visited June 5, 2003).

128 *See* Pontificia Universidad Católica del Perú y la Sociedad Perruna de Derecho Ambiental Firman Convenio Hacia la Creación de un Centro de Excelencia con Apoyo de la UICN, *at* http://iucn.org/themes/law/pdfdocuments/Nota%20de%20Prensa.pdf (last visited June 5, 2003).

VI. CONCLUSION

In the aftermath of World War II, when development assistance to advance U.S. policy goals abroad began in earnest, a movement that became known as the "law and development" movement was launched.[129] The naive effort to export U.S. legal culture and pedagogy was roundly viewed as a failure.[130] The failure of the law and development movement could have been predicted from its premise—that the U.S. legal tradition is inherently superior and adaptable to all cultures.

The mechanisms for sharing jurisprudence in environmental law in the 1990s have departed from the failures of the past. The result, at least in the public interest sector, has been a robust horizontal collaboration among environmental lawyers sharing a collective interest (*interés colectivo*) and seeking to find and evolve jurisprudential devices to advance that interest.

The fruits of these collaborations are evidenced in the jurisprudential developments that are described in this Article, and many more that are not. This shared interest approach to law making was on display during the Cuba academic/professional exchange discussed at the beginning of this Article. There it soon became clear that, despite the enormous sociopolitical divide, lawyers are lawyers everywhere, and there are environmental lawyers in Cuba.

---

129. *See generally* JAMES A. GARDNER, LEGAL IMPERIALISM: AMERICAN LAWYERS AND FOREIGN AID IN LATIN AMERICA (1980).

130. The Law and Development Movement and its failures are summarized in Wilson, *supra* note 122, at 392-98.