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The new perspective on the declaration of Damage Environmental in Ecuador: Application of the Proportionality as a conflict resolution mechanism

The new perspective of the declaration of Environmental Damage in Ecuador, application of the Proportionality Test as a mechanism for conflict resolution

Carlos Andrés Izquierdo Apolo
Pérez Bustamante & Ponce Law Firm
City: Quito
Country: Ecuador

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ABSTRACT: This article aims to develop a methodological proposal for the application of the proportionality test as a conflict resolution mechanism in the new environmental damage declaration procedure in Ecuador, based on the systematization of theoretical conceptions and legal and administrative procedures, and constitutional principles that regulate economic activities with criteria of environmental sustainability, and the recognition of the rights of nature. Consequently, the research allowed us to extract the main results: (a) to conceive proportionality as a methodological criterion and legal construction; (b) the proportionality test becomes a mechanism at the service of the judge that seeks to provide solutions to adequately resolve conflicts, subject to the principles that govern the rights of nature and economic activities, directly established in the Constitution; and, (c) the proportionality test can be a tool for the motivation of administrative resolutions of declaration of environmental

damage, as it will be useful to determine: 1) whether a fact can be considered environmental damage, 2) the amount of the fine imposed, 3) the minimum measures to approve remediation or environmental reparation plan, and 4) the amount of compensation to the victims of the environmental damage. Because of these results, it can be concluded that the normative vacuum in this matter lends itself to the discretion and arbitrary interpretation of the authority, justifying, therefore, the present methodological proposal of the proportionality test for the declaration of environmental damage.

KEYWORDS: Environmental legislation, resources, environmental law, sustainable development, energy resources.

ABSTRACT: The objective of this research is to develop a methodological proposal for the application of the proportionality test as a conflict resolution mechanism in the new perspective of the declaration of environmental damage in Ecuador, based on the systematization of the principles, theoretical conceptions, and legal procedures and administrative that regulate economic activities with criteria of environmental remediation and ecosystem sustainability. Consequently, the research allowed to extract the main results: (a) Conceiving proportionality as a methodological criterion and legal construction; (b) the proportionality test becomes a mechanism at the service of the judge that seeks to provide solutions to adequately resolve conflicts, subject to the principles that govern the rights of nature and economic activities, directly established in the Constitution ; and, c) The proportionality test can be a motivational tool for administrative decisions declaring environmental damage, as it will be useful to determine: 1) if an event can be considered environmental damage, 2) the amount of the fine imposed, 3) the minimum measures to approve an environmental remediation or repair plan, and 4) the amount of compensation to victims of environmental damage. Given

these results, it can be concluded that the regulatory void of this matter lends itself to the discretion and arbitrary interpretation of the authority, thus justifying the present methodological proposal of the proportionality test of the declaration of environmental damage.

KEYWORDS: environmental legislation, resources, environmental law, sustainable development, energy resources.

CÓDIGO JEL: F18, O13.

INTRODUCTION

In Ecuador, environmental regulations have undergone recent changes because of a new constitutional policy that recognizes rights to nature. The action for environmental damage has been one of the institutions that have undergone the greatest changes.

A short time has passed since the issuance of the Regulations to the Organic Environmental Code, this body of law does not fully regulate the procedure for environmental damage actions; and little or nothing has been written in the doctrine regarding the change in the procedure for declaring environmental damage included in this regulatory framework.

This article will provide background information on the recognition of nature as a subject of rights, with special emphasis on the context of the 2008 constitution, and the perspective with which it conceives of coupling extractive industries with respect for the 'Pacha Mama'; likewise, a brief historical account will be given of the evolution of environmental law centered on the institution of environmental damage, and how it has evolved in Ecuadorian legislation.

Similarly, basic concepts for understanding environmental damage will be analyzed, and then a comparison will be made

between the Environmental Management Law of 1999, and the Organic Environmental Code and it is General Regulations of 2018 and 2019 respectively; with the help of constitutional principles, a brief study will be made of the procedure for declaring environmental damage in Ecuador.

Finally, as a mechanism to control discretionally, and given the lack of normative development of objective parameters for the calculation of compensation and indemnities, it will be proposed to use the proportionality test as a tool to motivate the different moments included in a declaration of environmental damage.

1. HISTORICAL BACKGROUND AND RECOGNITION OF NATURE AS A SUBJECT OF RIGHTS

Ecuador currently has a recent constitution. In 2008, following a constituent assembly, a neo-constitutional supreme law was approved. It can be considered "the most advanced product of the new Latin American constitutionalism" (Melo, 2013, n. p.). The pillars on which this new Ecuadorian state is founded are the recognition of plurinational, the general orientation of development towards Sumak Kawsay[1] and the recognition of the Rights of Nature.

In the early 1960s, oil exploitation began in the north-eastern Amazon region. As a result, hydrocarbon exports led to an economic boom in the country; during the following years, income from oil exports represented between 26% and 34% of the total income of the non-financial public sector (Hernández, 2020, pág. 212). However, the following years were also marked by both socio-environmental conflicts (Valladares & Boelens,

1 "Sumak kawsay, or full life, expresses this worldview. Achieving a full life consists of reaching a degree of total harmony with the community and the cosmos". National Plan for Good Living (2009-2013).

2019, pág. 305) and natural disasters caused by this industry; the best known is the Texaco-Chevron case, in which it is estimated that between 1967 and 1992, more than 18 billion gallons of oil were dumped directly into the environment (Sanandrés and Otálora, 2015, p. 230). This was partly a consequence of the lack of environmental standards in the legislation regulating the matter at the time and the nature of the contracts entered (Switkes, 1994). Thus, it has been said that the incursion of the oil industry generated expectations of national growth and social progress, but ultimately failed (Unda Mateus, 2019, pág. 162). The judicial process surrounding these events began in 1993, and at the time of the discussion of the 2008 Magna Carta, there was still no final decision.

Likewise, Andean philosophy is one of the foundations on which the Montecristi Constituent Assembly was based. The sumak kawsay was considered from various perspectives (Llasag Fernández, 2009). It is considered in the preamble and as one of the primary duties of the State. Similarly, in the dogmatic part, the classification of rights as civil, political, economic, social, and cultural rights is left behind. Some, such as the right to water, food, a healthy environment, health, work, among others, are grouped under the category of "Rights of Good Living". Finally, the organic part of the Supreme Norm establishes a development regime focused on the realization of the good living.

In the preamble, the phrase "We decide to build a new form of citizen coexistence, in diversity and harmony with nature, to achieve good living, the sumak kawsay" reflects the influence of the indigenous cosmovision in the Constitution, and the need to build a coexistence of human beings in harmony with nature. Considering that Andean philosophy discards anthropocentrism; on the contrary, nature is an element with which the human being complements, corresponds, and

interrelates reciprocally since nature requires the beings that inhabit it, and vice versa (Ávila, 2016, pp. 122-129).

In summary, there were four decisive factors for the incorporation of nature as subjects of law: (i) the historical moment provided by a constituent assembly charged with outlining the plan for a new Ecuadorian society; (ii) the previous struggle of the environmental movement that elevated the discussion of environmental problems to constitutional status; (iii) the destructive socio-environmental effects of oil extraction in the Ecuadorian Amazon in the wake of the oil boom and; (iv) the presence and power of the indigenous movement and the work of activists as part of an international network. (Laastad, 2020, págs. 406-408)

This recognition was the result of the articulation of actors from different cultural and geographical scales, including indigenous and environmental organizations (Valladares & Boelens, 2019, pág. 309). It was in this historical context that the recognition of the rights of nature was forged. Thus, nature, or Pacha Mama[2] , is recognized as a space where life is reproduced and realized (CRE, 2008, art. 71). It ceases to be something and becomes someone, which is why a range of rights are recognized in its favor, established in articles 71 to 74 of the Supreme Law. Among the most important we can mention: i) To their integral existence, with emphasis on the maintenance and regeneration of their vital cycles; ii) To their restoration. The State will act as guarantor of these rights in cases of serious or permanent environmental impact.

In the same way, a series of state obligations are raised to constitutional rank concerning this new subject of law. These include encouraging and promoting respect for and protection of nature. And to apply precautionary and restrictive measures

2 Kichwa indigenous expression means Mother Earth.

for activities that could lead to the extinction of species, the destruction of ecosystems, or the permanent alteration of natural cycles.

Prima facie, extractive activities are at odds with the rights of nature. However, the constituent proposed a perspective of harmonization of these activities with the rights now recognized. "By recognizing rights to nature, in essence, what [is] being achieved is that its use and exploitation be treated with much more care" (Ávila, 2012, p. 107). In other words, the constituent used a perspective of balance between extractive activities and environmental rights.

This vision of balance is the axis around which the use of non-renewable natural resources and the development of the so-called Strategic Sectors revolves. Under this criterion, these activities are exclusively administered by the central State; they are lawful and permitted if they observe the environmental principles of sustainability, precaution, prevention, and efficiency, established in article 313 of the Constitution.

However, the cases in which the development of extractive activities is prohibited have constitutional status. The Constituent Assembly established a general prohibition - protected areas and intangible zones. An exception was the declaration of national interest by the National Assembly -or Congress-, at the request of the Presidency. Sometime later, through a referendum[3] , a special prohibition was added to the metallic mining industry, whereby, in addition to the above, it may not be carried out in urban centers. All this was established in article 407.

3 Held on 04 February 2018, question 5: "Do you agree with amending the Constitution of the Republic of Ecuador to prohibit metallic mining in all its stages, in protected areas, in intangible zones, and urban centers, according to Annex 5?"

Since the entry into force of the 2008 Constitution, environmental legislation has undergone a series of adaptations and reforms to bring it into line with the principles and rights enshrined in the Constitution.

2. . HISTORICAL CONTEXT OF ENVIRONMENTAL LAW AND REGULATION OF ENVIRONMENTAL DAMAGE.

Contemporary states "have assumed the environmental issue as another public function. And this is because the deterioration suffered by the goods that make up the environment has an impact on the life, health, and quality of life of the population" (Bermudez, 2014, p. 25). Environmental protection is implemented through various tools, among which we find: Environmental public policy and Environmental law.

It is important to point out that environmental public policy can be supranational or national, in the supranational sphere in the 1970s several instruments for environmental protection emerged (Rojas Montes, 2019, pág. 121). Thus, the United Nations, through its conferences in Stockholm in 1972 and Rio de Janeiro in 1992, gave the first international guidelines. The Stockholm Declaration on the Human Environment is considered "the founding act of modern environmental law" (Juste, 1999, p. 16). The Rio Declaration on Environment and Development, meanwhile, sets out a series of global principles for environmental protection, Principle 11 highlights the importance of the regulatory role of the state in environmental matters (Rojas Montes, 2019, pág. 123).

In terms of national public policy. By way of background, we can mention the Forestry Law of 1958, which declares in its first article the "public interest [of] the conservation, protection, improvement, and promotion of forests". However, there was legal dispersion in environmental matters; likewise, as part of the public administration, numerous ministerial

departments and units, autonomous and semi-autonomous entities dedicated to environmental policies were created, which acted in a disjointed[4] ; in 1996, with Executive Decree 195, was the Ministry of the Environment created as an entity with exclusive environmental competencies.

Environmental law, for its part, can be viewed from different perspectives. As legislation that creates bodies and attributes functions imposes limitations on the exercise of economic activities that ensure the protection of the environment. Or as the right to the use of common goods, through an authorization, concession, or permit. As it is cross-cutting, we can speak of environmental administrative law, environmental criminal law, environmental constitutional law, among others (Bermudez, 2014, pp. 35-37).

Thus, the tools used by environmental law can be of a repressive or preventive nature; when talking about environmental damage, we find ourselves in the repressive sphere, while the preventive spectrum is found, for example, in emission and environmental quality standards.

2.1. Environmental damage in Ecuador

To begin to talk about the treatment of environmental damage in Ecuador, it is necessary to go back to a period before the return to democracy. In 1976, the Supreme Council of Government issued the Law for the Prevention and Control of Environmental Pollution by Decree. This normative instrument can be taken as an antecedent to the conception of environmental damage since it imposes sanctions for conducts that produce "environmental contamination". These range from fines to imprisonment, using people's health as a cross-cutting issue; thus, a fine is imposed if it causes illness, and imprisonment if people die because of the pollution.

4 These aspects are referred to in the recitals of Executive Decree 195 of 1996.

Subsequently, continuing with recent historical analysis, the institution of environmental damage, as such, was fully regulated since 1999, when the Environmental Management Law was issued, which, after a codification in 2004, was in force until 2018. This law was replaced by the current Organic Environmental Code.

As will be analyzed, the approaches used by both regulations when referring to environmental damage differ from each other. To better understand the differences between both regulations, it is necessary to point out -in a preliminary way- the following concepts:

2.2. Environmental damage: pure ecological damage and environmental civil damage

As a premise, it is necessary to understand that not every event gives rise to damage. Thus, a double requirement must be met: (i) that the law establishes the conduct in a type that describes it (principle of typicality) and, (ii) that the event occurs "due to...", or "because of..."; expressions that allude to causality, which is the guiding principle in this matter. (Zárate González, 2019, pág. 106).

In the same way, the term environmental damage evokes a concept that is not universal; each piece of legislation has shaped it according to its historical evolution, and it is present and future perspectives. Filling this term with content goes hand in hand with the tools that each legal system contemplates to give protection to nature as an entity, or to the right of people to live in a pollution-free environment.

By way of example, the COA (2017) defines environmental damage as:

> Any significant alteration which, by act or omission, produces adverse effects on the environment and its

> components, affects species, as well as the conservation and balance of ecosystems. This shall include unrepaired or inadequately repaired damage and other damage comprising such alteration. significant. (p. 90)

Whereas the repealed Environmental Management Law (2004) defined it as follows: "It is any loss, diminution, detriment or significant impairment of pre-existing conditions in the environment or one of its components. It affects the functioning of the ecosystem or the renewability of its resources" (p. 41).

Although in practice, the two definitions are very similar, their wording contains different elements. Thus, the COA understands that the alteration to the environment, or its components, must produce adverse effects, given that there may be alterations that produce benign effects. The effect must be on species or the conservation and balance of ecosystems. And finally, unrepaired, or poorly repaired damage is included, although it is evident that it is redundant to establish that environmental damage includes unrepaired or poorly repaired -environmental- damage, and other -damage-.

For its part, the Environmental Management Law uses the terms loss, decrease, detriment, or impairment to characterize the negative impact on the pre-existing conditions of the environment -or one of its components-; that is, it is necessary to make a comparison of the environment before and after the damaging impact. To determine the occurrence of damage, the functioning of the ecosystem, or the renewability of its resources, will be assessed.

A common element between the two definitions is significance. That is, not every alteration (loss, diminution, stoppage, or impairment) to the environment is environmental damage, it must exceed a certain threshold[5] .

5 Since the term evokes an indeterminate concept, it is usually up to

Where there is uniformity of criteria is concerning the conception of environmental damage from a double sphere (Bedón, 2010-2011, p. 13). Environmental damage per se or pure ecological damage -in the words of Professor Femenías- is understood as that which exclusively affects nature and the environment without consideration of individual or collective ownership of rights. And civil environmental damage, which refers to civil damages suffered by individuals, and which are derived from the same event that caused the environmental damage (Femenías, 2017, p. 239); within this category, we find personal, patrimonial, or economic damages. René Bedón, citing Néstor Cafferatta, distinguishes between damage affecting the health and integrity of individuals, their property, and damage to the exercise of economic activities (Bedón, 2010-2011).

A second point should be made concerning regulated activities carried out in compliance with an environmental license or authorization, although they affect the environment, they cannot be considered as environmental damage because they are activities foreseen by the State within its environmental public policy. Unlike activities carried out beyond the authorized limit, which would constitute environmental damage and, therefore, should be subject to compensation, indemnification, and restoration (Bedón, 2010-2011, p. 14).

There has been constant discussion about the response that the State should give when sanctioning environmental damage. One position holds that this should be done through Environmental Criminal Law, that is, through the classification of crimes with their respective sanctions, due to the affectation of highly important legal assets (Márquez, 2007) or only through Administrative Sanctioning Law, under the figure of environmental administrative infractions, given that

the judges to determine its parameters, see (Femenías, 2017, pp. 220-230).

environmental criminal regulations would be illegitimate and ineffective (Gómez, 2015). An intermediate position is one in which the declaration of environmental damage is preceded by a judicial process, reserved for the analysis and decision of a special -non-criminal- jurisdictional body, such as the Chilean case, which since 2012 has had specialized courts that resolve all environmental conflicts.

Regarding environmental civil indemnities, there are legislations such as Ecuador's that -since 2018- allow the same authority that declares the environmental damage to carry out the corresponding valuation, as will be analyzed below. Other models foresee separate actions and strings for both types of liability, as was the case in Ecuador before 2018.

Having clarified the above concepts, I will now analyze the changes made to Ecuadorian legislation.

3. COMPARISON OF THE DECLARATION OF ENVIRONMENTAL DAMAGE IN THE ENVIRONMENTAL MANAGEMENT LAW, THE ORGANIC ENVIRONMENTAL CODE, AND ITS GENERAL REGULATIONS, IN THE LIGHT OF ENVIRONMENTAL PRINCIPLES.

As mentioned, the approval of a new Magna Carta in 2008 caused environmental legislation to undergo significant changes, seeking to make it compatible with this new perspective, whose axis is the conception of nature as a subject of rights. The conception of environmental damage established in the Environmental Management Law changed radically with the issuance of the Organic Environmental Code and its General Regulations.

Firstly, the repealed Environmental Management Law contemplated a clear distinction of actions regarding environmental damage 'per se' or pure ecological damage, and civil environmental damage. In terms of standing, a public

action was granted to denounce the violation of environmental regulations, i.e., any citizen is entitled to initiate an action for environmental damage. But only those directly affected could initiate the civil action for compensation, because of the environmental damage suffered.

Jurisdiction in environmental damage actions was vested in the Presidents of the Superior - or Provincial - Courts of the place where the environmental damage occurred; it should be noted that these Courts were second instance judges. While the civil action for environmental damage had to be heard through a summary civil procedure before the Judges of the first instance. And it was expressly forbidden to accumulate both actions (Bedón, 2010-2011, p. 26).

That is to say, the Environmental Management Law designed an action that decided on pure ecological damage, or environmental damage 'per se'; whereas the compensation of private civil damages derived from the same fact that caused the damage was regulated by the classic regime of non-contractual liability, contained in the Civil Code.

As a second point, we will analyze the substantial changes that the declaration of environmental damage has undergone in the light of current Ecuadorian legislation, analyzing the environmental principles that are linked to this institution.

As discussed in the previous section, the definition of environmental damage was coined in a glossary of terms at the end of the Organic Environmental Code. Book Seven of the Code regulates the integral reparation of environmental damage and its sanctioning regime. The first two titles correspond to: I) the integral reparation of environmental damage and II) the sanctioning power, in these articles the new action for environmental damage was to be developed, but as will be seen, its explanation is insufficient.

As a starting point, Article 289 establishes the competence of the National Environmental Authority - Ministry of Environment - to determine the guidelines and criteria necessary to characterize, evaluate and assess environmental damage, as well as to adopt prevention and restoration measures. If the legislator was seeking ways to modify the procedure for declaring environmental damage, as established in the Environmental Management Law, this article falls short, as it does not determine the central bases or criteria on which the state institutions should be based to assess and sanction an action that could be considered environmental damage.

Unlike the Environmental Management Law, the new organic code does not develop a procedure for declaring environmental damage. Despite this provision, the procedure was developed in the General Regulations of the Organic Environmental Code, issued by Executive Decree 752 of 21 May 2019, published in Official Gazette Supplement 507 of 12 June 2019. This will be analyzed in the following section.

On this point, it is worth mentioning that our Constitution, in Article 132, establishes the reservation of law concerning the classification of offenses and the consequent corresponding sanctions. The basis of the principle of criminalization is linked to the principle of legal certainty or security and has a twofold purpose.

> Although in the criminal field it is debated whether the basis of the principle of criminalization should be found in the subjective certainty that it should provide, or in a normative guarantee that reserves to the legislator the determination of punishable conducts, what is certain is that in administrative matters, criminalization fulfills this dual function. (Cordero, 2014, p. 416).

Thus, the Organic Environmental Code is not clear in establishing the sanction that follows from a declaration of the

existence of environmental damage. Title IV, which regulates infractions and sanctions, does not include environmental damage as an environmental administrative infraction in any of its different degrees.

3.1. Particularities of environmental damage in the light of environmental principles

Article 396 of the Supreme Law establishes three environmental principles that are later developed by the Organic Environmental Code. Firstly, the principle of strict liability for environmental damage, leaving aside the traditional regime of fault or malice. Similarly, it establishes the "polluter pays" principle[6] whereby "the producer of goods or services must be responsible for the costs of preventing, preventing or eliminating pollution caused by production processes" (Bermúdez, 2014, p. 49). And finally, the imprescriptibility of the action for environmental damage.

The legislator, in regulating these principles, included in the Preliminary Book of the COA: "Any natural or legal person that causes environmental damage will have strict liability, even if there is no malice, fault or negligence" (Organic Environmental Code, 2017, art. 11). Subsequently, when developing the polluter-pays principle, Article 290 establishes rules for the attribution of liability, which provide answers to cases in which a complex causality is evident[7] ; in this way, liability for environmental damage can be both extended and transmitted and can even become joint and several. It is extensive towards the legal person that can make decisions, in the case of the action of a group of companies; and likewise, towards the partners or shareholders, when their extinction occurs. It is

6 Also known as "Polluter pays", or "Polluter should pay", as the naming of the principle is not uniform.

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transmitted in the event of the death of the natural person responsible. And it is joint and several, for the administrators or legal representatives of the companies, as regards outstanding obligations during their management; as well as, if there is evidence of a plurality of causers of the same damage. Finally, the imprescriptibility of the action is developed in the following sense: "Actions to determine liability for environmental damage, as well as to prosecute and punish them will be imprescriptible" (Código Orgánico del Ambiente, 2017, art. 305). It should be specified that, concerning civil liability actions arising because of environmental damage, the statute of limitations that will apply will be that established in the applicable civil law.

The regime is strict liability. In terms of exonerating circumstances, it is extended by Articles 307 and 308, which regulate cases of force majeure or fortuitous event and third-party fault, respectively. The standard of liability in cases of force majeure or fortuitous event is high since it is up to the operator to prove that "such damage could not reasonably have been foreseen or that, even if foreseeable, it is unavoidable". Similarly, third party fault is exempt from liability only if certain conditions are met: Firstly, there must be no contractual relationship with the operator; And it is up to the operator to prove that he did not cause or participate in the occurrence of such damage and that he took all necessary precautions to avoid the intervention of the third party. It is important to note that, in both cases, the exoneration applies only to administrative penalties. And in the case of third-party fault, "the operator may bring such legal action against the responsible party as it deems appropriate to recover the costs incurred".

As for the precautionary and prevention principles, contained in Article 396 of the CRE, they do not have exclusive application in situations of environmental damage. It is important to establish that the former justifies the taking of

measures and actions to prevent damage in situations in which there is no scientific evidence to support a causal link between the activities and the damage they supposedly cause. The second is based on the certainty of harm, i.e., there is already scientific evidence to support the taking of measures (Durán and Hervé, 2002). These are transversal in all the institutions addressed by the COA, around liability for environmental damage we find them mainly in the evaluation of environmental impacts, and they are closely related to the principle of "Best Available Technology and Best Environmental Practices" established in article 9 of the aforementioned code. In the reactive sphere, once environmental damage has occurred, two obligations are placed on the operator in the application of these principles. Firstly, to notify the authority within 24 hours of the occurrence of the damage (Organic Environmental Code, 2017, art. 291), and to adopt measures. In the event of an imminent threat of environmental damage, these measures must be taken to prevent it; while, in the case of damage, the regulation establishes an order of measures to be taken: 1. Contingency, mitigation, and correction; 2. Remediation and restoration; 3. Compensation and indemnification; and 4. Monitoring and evaluation.

Although it is not an environmental principle per se, the Supreme Rule established a state obligation, whereby it must act immediately and subsidiarily, repairing the environmental damage and reserving the right of recourse against the operator causing it, without prejudice to the responsibility of the officials in charge of environmental control. (Organic Environmental Code, 2017, art. 397). Article 294 of the law limits the content of this obligation by establishing cases in which the Environmental Authority will intervene: when there is environmental damage that has not been repaired, or when the repair plan has not been complied with; when it has not been possible to identify the operator responsibly, and when due to the magnitude and seriousness of the environmental damage it is not possible to

expect the intervention of the operator; additionally, in case of danger of new damage, the State will intervene when the operator is unable or unwilling to assume it.

Another point developed by the code corresponds to the rules governing the declaration of environmental damage. Article 303 provides for a reversal of the burden of proof, i.e., it is up to the operator or manager of the activity to disprove the existence of environmental damage; likewise, it establishes the non-applicability of statutes of limitation for purely environmental damage, and the civil or criminal statute of limitations for the corresponding actions because of the same.

4. PROCEDURE FOR THE DECLARATION OF ENVIRONMENTAL DAMAGE

In June 2019, the General Regulation to the Organic Environmental Code was issued. The procedure for declaring environmental damage is detailed from articles 807 to 821.

Firstly, an extension of the concept of environmental damage was established, whereby environmental liabilities are included in this category. Likewise, objective criteria were included to delimit the significance of the same, these are magnitude, extension, and difficulty of reversibility of the environmental impacts; the affectation to the state of conservation and functioning of ecosystems and their physical integrity, capacity for renewal of resources, alteration of natural cycles, the richness, sensitivity, and threat to species, the provision of environmental services; or, the risks to human health associated with the affected resource.

Regarding the authority that qualifies an act as environmental damage, this Regulation is ambiguous, as it determines that in administrative proceedings it is the competence of the Environmental Authority; and, in judicial proceedings by the competent judge. It is not clear whether

it should be inferred that there is a jurisdictional action of environmental damage or whether it classifies environmental crimes under the category of environmental damage. This confusion goes deeper, when analyzing the Code, it is evident that the Competent Environmental Authority is obliged to send the necessary information to the Prosecutor's Office when there is a presumption that an environmental crime has been committed. However, no mention is made of any jurisdictional action for environmental damage.

The administrative sanctioning procedure can have a diverse origin, either by self-denunciation, reports from environmental control and monitoring mechanisms, or by denunciation from a third party; it is then up to the Authority to carry out an on-site inspection to verify what has been described, and, depending on the case, to order a "Preliminary characterization" or "Detailed investigation". The difference between both mechanisms lies in the depth of the studies carried out to determine the existence of significant environmental damage.

With this information, it is up to the Authority, through a reasoned resolution, to initiate the Procedure, the times, deadlines, and procedural characteristics were not developed by this regulation, so the contents of Book Three of the regulation should be considered.

Once the Authority has determined the existence of environmental damage, it will order the operator to submit a "Comprehensive Remediation Plan". This is the most innovative instrument, as it is the mechanism by which the environment will be repaired or remediated, including a compensation to affected persons and communities. This must be proposed by the responsible operator and approved by the Environmental Authority. Finally, it is determined that the environmental civil action is only available in respect of compensation not agreed in the plan.

As for the amounts of compensation and indemnification, they must be made following "the methodological criteria developed by the National Environmental Authority". Moreover, it is evident that this can be a highly discretionary element, so the regulation imposes the obligation to determine objective criteria for its calculation.

This new regulation is a paradigm shift, opening the way to liability for environmental damage declared in administrative sanctioning law, with an important innovation concerning civil environmental damage. If an environmental reparation plan containing a compensation is approved in favor of the persons affected by pure ecological damage, civil judges lose jurisdiction to hear the corresponding actions.

5. PROPOSAL: PROPORTIONALITY TEST

Concerning the legislation analyzed, and the regulation of environmental damage in administrative proceedings, I propose that the test of proportionality be used as a tool to control discretionally.

When speaking of principles, we must use the meaning given by Robert Alexy's theory their application in a specific case depends on the weighting that is given to the principles that collide with it. Furthermore, a principle is an optimization mandate. Ramiro Ávila Santamaría, in addressing this point, states:

> By saying that they are mandates he reinforces the idea that principles are legal rules and, as such, must be applied. By saying that they are optimizing, it means that their purpose is to alter the legal system and reality. The principle is an ambiguous, general, and abstract rule. Ambiguous because it needs to be interpreted and recreated, it does not provide decisive solutions but rather gives parameters of understanding;

ambiguous also because, in its structure, it does not have hypotheses of fact, nor does it determine obligations or solutions. (Avila, 2012, p. 63).

5.1. Brief introductory analysis of the principle of proportionality.

As a prerequisite to the analysis of the principle of proportionality, it is necessary to identify that, due to the abstract nature of human rights, they inevitably collide with other human rights and collective goods such as, for example, the protection of the environment and public safety. Consequently, they require a process of balancing. (Alexy, 2011)

On this point, Barak argues that the application of the proportionality rule can only operate at the infra-constitutional level, either through law or judicial decision. At the constitutional level, the norm is constituted by "fundamental values" with a high level of abstraction, which aspire to be realized in their maximum expression; however, in infra-constitutional application these ideals cannot be realized to their full extent and must be realized in varying degrees of intensity. This realization in the concrete case is not part of the factual assumption of the right, but of its scope of protection. Consequently, these restrictions do not change the scope of the fundamental right; rather, the rules of proportionality define the scope of such realization. (Barak, 2017, p. 65).

Thus, a democratic society must recognize the possibility of restricting fundamental rights. Barak considers that there are two types of restrictions: the first involves a restriction on one person's right to make way for the rights of another; the second involves restrictions in favor of public interest considerations, such as ensuring public education, public health, etc. Since fundamental rights belong to the individual as part of society, they can be restricted by measures aimed at achieving social goals.

Thus, the rights of nature are not absolute, since it is impossible to have a zero degree of pollution; Moreover, what the Constitution intends is that economic activities are carried out in accordance with the principles of environmental sustainability, precaution, prevention, and efficiency or, in other words, that they are carried out in harmony with nature. For its part, the right to carry out economic activities has various restrictions, such as, for example, the rights of workers, the rights of nature discussed above, and the collective right to live in a healthy and pollution-free environment.

Furthermore, the various means by which a fundamental right can be realized are determined at the infra-constitutional level. These restrictions are constitutional to the extent that they meet the requirements of proportionality. (Barak, 2017, p. 110). Whenever a fundamental right is defended through acts of the state, but this defense entails the restriction of another right, a conflict between these rights will arise within the legal "zone of authority" of the state. Given the characteristics of the Ecuadorian legal system, and the recent reform, which transferred the competence to determine environmental damage from the judges to the servants of the National Environmental Authority (Ministry of Environment and Water), my proposal extends the premise of the Israeli professor, and in this way a proportionality test is applied, not only in the legal and judicial venue, but also in the administrative venue.

The proposal of this research is that the decision taken by the authority in charge of determining an event as environmental damage, and ordering the measures for its reparation, should apply the proportionality test. Ultimately, the official's task will consist of preferring a fundamental right of nature, a person or a collective against the State, over the fundamental right of another natural or legal person against the State; that is to say, a weighing that will consider each of the rights in the

light of the facts of the specific case. In Barak's words, when a person brings a claim against the state, alleging that his or her fundamental rights have been improperly restricted, he or she is in fact claiming that such a measure is ultimately unconstitutional. Such a claim must be examined according to the rules of proportionality. (Barak, 2017, p. 116).

5.2. Components of proportionality

Proportionality can thus be defined as a legal construct. It is a methodological instrument composed of 3 components, according to Alexy and other authors, or 4 in Barak's understanding. Any restriction must consider these components to be in line with the Constitution. Consequently, proportionality is the legal instrument by which it is possible to determine the relationship between fundamental rights and their infra-constitutional restrictions.

As mentioned above, authors such as Alexy and Bernal Pulido argue that the principle of proportionality is made up of three sub-principles: suitability or adequacy, necessity, and proportionality in the strict sense or weighting. For his part, Barak argues for the existence of a fourth sub-principle, that of rational connection. To bring clarity to these concepts, I will adopt what Leiva explains, and consider the subprinciple of rational connection as part of suitability or adequacy.

In the same way, to better explain the methodology developed by the proportionality test, when describing each subprinciple, I will carry out a hypothetical analysis of the way in which these subprinciples could be realized, taking a case of environmental damage produced by the activities in the operation of a company. In the face of a conflict between the right to carry out economic activities and the right to respect and restore nature.

5.2.1. The principle of appropriateness or adequacy.

Linked to factual possibilities, it is that which 'precludes the adoption of inidoneous means that obstruct the realization of the principles or ends for which it has been adopted' (Alexy, 2011, p. 13). In other words, an expression of the postulate of the Pareto Optimum, whereby one position can be improved without harming the other. Bearing in mind that any intervention in fundamental rights must be adequate to contribute to the attainment of a constitutionally legitimate end. (Bernal Pulido, 2007, p. 693).

Now, in its application it is necessary to identify the legitimacy of the end and the technical adequacy or rational connection (Leiva, 2018, p. 108). The first concept refers to the end being adapted to the values of society in a constitutional democracy. Whereas, with the second, it is examined whether the means chosen can further the end pursued, or in Barak's words: it is required that "the means used by the restrictive measure conform to (or are rationally connected with) the end for which the restrictive measure is designed to fulfil" (Barak, 2017, p. 337).

With respect to the proposed hypothetical case, the official is aware of an environmental harm and its remediation. First, he or she must identify what ends are pursued by such a procedure. The cornerstone will be the rights of nature, especially its right to the integral respect of its existence, to the maintenance and regeneration of its vital cycles.

As a second point, the different measures that can be adopted in the event of environmental damage are described in Article 292 of the Organic Environmental Code; thus, the official must analyze in the specific case, which of these measures are suitable for the achievement of the end pursued by the Constitution.

5.2.2. The sub-principle of necessity.

Like the previous one, linked to the factual possibilities. It requires that between two equally suitable means for the realization of the first principle, the one that is less harmful to the second principle must be chosen. (Alexy, 2011, p. 14). In other words, it demands that the effects be the least harmful possible. (Leiva, 2018, p. 121) Or that there is no other hypothetical alternative that is less harmful to the right in question and at the same time equally promotes the purpose of the law, since, if there is another less restrictive alternative, capable of achieving the purpose of the measure, then there is no need for it. (Barak, 2017, p. 351).

As this is a hypothetical test, in the proposed case, the official should make a comparative analysis of all the measures that may be available to him, and that meet the appropriateness described in the previous point, which would be less harmful to the company's right to carry out economic activities. For example, in addition to remediation and restoration measures, compensation that entails declaring the company bankrupt or revoking the environmental license would be extremely damaging. Such measures would only be necessary in extreme cases.

5.2.3. The subprinciple of proportionality in the strict sense or weighting.

This sub-principle is linked to legal possibilities. It requires that, to justify a restriction to a fundamental right, there must be an adequate relationship between the benefits obtained from the fulfilment of the purpose, and the infringement caused to the fundamental right with the attainment of that purpose (Barak, 2017, p. 375). In other words, for an infringement of a right to be proportional, the advantages achieved by the intervention (by the measure established) must compensate for the sacrifices

that this measure imposes on its holder, or, that the infringement of a right is justified to the extent of the importance of the end pursued by said intervention. (Leiva, 2018, p. 135).

This sub-principle implies that the end pursued by the measure and the impairment of the fundamental right are weighed with a view to establishing the conditions under which one precedes the other. In other words, at one extreme, it will be measured how much satisfaction the measure will achieve with the impairment of the right (its degree of realization); at the other extreme, the intensity of the impairment of the right by the measure (its degree of restriction) must be determined. Likewise, both the legitimate aim and the fundamental right, respectively, can be realized and restricted in 3 magnitudes: low, medium, or high (Leiva, 2018, p. 136). At this stage, numbers can be relevant. To determine the intensity of a given limitation; then, the decision-making body can consider the number of people who would be affected, as well as the number of people who would benefit from the materialization of the determined end (Ferreres Comella, 2020, p. 180)

In conclusion, and considering the hypothetical case analysed, for a measure ordered by the authority that is aware of the environmental damage to be proportional in the strict sense, the degree of affectation of the right must be the same as the degree of satisfaction of the end that motivates the measure. For example, a measure ordering the revocation of an environmental license would restrict the company's right to carry out economic activities to a high degree. For such a measure to be proportional, it is necessary that a high benefit obtained through the measure is required, either because the environmental damage falls into the category of irreparable damage, or because the company's repeatedly harmful behavior is observed.

6.3. Possible use in the environmental damage declaration.

In administrative proceedings, an environmental damage procedure will culminate in an administrative act of a declaratory nature, understood as a resolution that will certify that the facts analyzed do or do not fall within the category of environmental damage, in the same way, will analyze the measures for remediation, restoration and compensation of nature.

Professor Soto Kloss, however, states that for an administrative act to be valid, it must necessarily have a rational basis, i.e., it must respond to criteria of reasonableness, understood as proportionality, convenience, and opportunity (Soto Kloss, 2012, p. 429).

From the regulations analyzed, it can be deduced that the work of the Administrative Authority that resolves this environmental damage procedure will revolve around two aspects. On the one hand, to determine the existence or not of environmental damage, and on the other hand, to approve or not an environmental remediation plan. As will be analyzed below, the application of the proportionality test is an appropriate and adequate tool to avoid arbitrariness in these cases.

Proportionality as a tool has been adopted by different legal systems. Its development took place in German constitutional law in the second post-war period, later it was adopted by the European Charter of Human Rights in 1976, and gradually by other European countries. The influence of European countries has had an important influence in Latin America, and moreover, the highest bodies of constitutional interpretation have been adopting the principle of proportionality. For example, the Colombian Constitutional Court established it in 1992, the Constitutional Court of Peru in 2005 and the Chilean Constitutional Court in 2007. (Barak, 2017, pp. 212-231).

Article 11 of the Ecuadorian Constitution determines the principles governing the exercise of rights. The third paragraph states that "The rights and guarantees established in the Constitution and international human rights instruments shall be directly and immediately applicable by and before any public servant, administrative or judicial, ex officio or at the request of a party". Accordingly, the fifth paragraph states that "In matters of constitutional rights and guarantees, public servants, administrative or judicial, shall apply the norm and interpretation that most favors their effective enforcement".

Furthermore, if an official is resolving a case of possible environmental damage, by the provisions analyzed above, he must apply the principles that govern the rights of nature and economic activities, established in the constitution directly; to the extent that their application is appropriate that it fulfills a constitutionally valid purpose. In other words, apply the principle of proportionality through its sub-principles.

Consequently, the official, among all the measures that fulfill the above purpose, choose the one that is the least harmful to the fundamental right in conflict. And carry out a weighing exercise in which he weighs the advantages obtained with the decision, in contrast to the sacrifices that it implies for the fundamental rights of those affected (Leiva, 2018). Similarly, it must observe the interpretation that best favors its validity; the proportionality test is the mechanism that would ensure the adequate validity of the principles in conflict or collision.

Thus, the proportionality test becomes a mechanism at the service of the judge that seeks to provide solutions to adequately resolve conflicts between fundamental rights and other fundamental rights or constitutional goods, through the reasoning that contrasts opposing legal interests to determine whether a restrictive measure is justified or adequate concerning the end pursued (Díaz, 2011, p. 171). Or as Professor Leiva argues, citing Barak:

> Proportionality is the methodological criterion - as a legal construct - according to which the realization of the fundamental right is measured, and more specifically by which the end of the means, the fundamental right, and the appropriate relationship between them are examined. (Leiva, 2018, p. 64)

The proportionality test can be a tool to motivate administrative resolutions declaring environmental damage, as it will be useful to determine: 1) whether an event can be considered environmental damage, 2) the amount of the fine imposed, 3) the minimum measures to approve an environmental remediation or reparation plan, and 4) the amount of compensation to the victims of the environmental damage.

Finally, it is not unusual that, in environmental proceedings for damages, millions of dollars are disputed; the use of this tool may be ideal to avoid the discretion of the administrative authorities and to ensure the effective enforcement of constitutional rights and principles.

CONCLUSIONS

Ecuador's bad experience with hydrocarbon exploitation in the 1970s and the recognition of plurinational influenced the constitution's recognition, which was subsequently approved by referendum in 2008.

This new perspective required that the entire legal and infra-legal environmental framework be modified in the search for an adequate implementation of the established constitutional precepts; given Ecuador's extractivist development model, coupling this model with the focus on guaranteeing the rights of nature was a very complex task. Balance and the principles of sustainability, precaution, prevention, and effectiveness are the axes around which the new environmental regulations revolve.

States, to a greater or lesser extent, have taken responsibility for the protection of the environment since it has a direct impact on the well-being of the population. One of the tools adopted is the punishment of actions or omissions that cause environmental damage. This institution has particularities that differentiate it from traditional civil liability.

In Ecuador, environmental damage has been regulated since 1999. With the approval of the Constitution of Montecristi, and the subsequent issuance of the Organic Environmental Code and its General Regulations, there was a radical change regarding the competent body to assess and decide on the occurrence or not of environmental damage, passing from the jurisdictional body to the administrative authority, which must follow an administrative sanctioning procedure. In the same way, this authority has the power to assess, quantify and accept or reject the compensations inherent to environmental civil liability, leaving as a subsidiary process, the extra-contractual civil procedure -only- concerning what was not agreed upon in the administrative venue.

The General Regulation leaves the door open for the amounts of compensation and indemnification to be established under methodological criteria developed by the National Environmental Authority, which is why it is proposed to use the test of reasonableness as a criterion for the control of discretion and protection of rights in cases of environmental damage. It can be a tool to determine whether an event can be considered environmental damage, the amount of the fine imposed, the minimum measures to approve a remediation or environmental remediation plan, and the amount of compensation to the victims of environmental damage.

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Carlos Andrés Izquierdo Apolo: Associate at Pérez Bustamante & Ponce Law Firm, he concentrates his practice in Mining, Oil and Energy Regulatory Law. He advises companies on compliance with their legal, environmental, and social obligations throughout the different stages of their operations. He has experience designing strategies for complex litigation related to constitutional actions and arbitration related to the extractive industries.

Email: cizquierdo@pbplaw.com

City: Quito

Country: Ecuador

ORCID: https://orcid.org/0000-0002-4312-3567