



[INTL] EPH
EPAX 200
9508-1995.1
0007

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

OFFICE OF
ADMINISTRATION
AND RESOURCES
MANAGEMENT

#33931034

**BUILDING INTERNATIONAL ECO-RIGHTS
CASE STUDIES: BRAZIL, CHILE, FRANCE, INDIA, POLAND, AND
THE UNITED STATES**

Kevin S. Parikh

Office of Environmental Justice
August 1995

U.S. EPA Headquarters Library
Mail code 3404T
1200 Pennsylvania Avenue NW
Washington, DC 20460
202-566-0556

INTRODUCTION:

The recognition of a fundamental right to a clean environment is an emerging concept under international customary law. Principle 1 of the Stockholm Declaration takes an initial step toward the recognition of this right:

Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being . . . ¹

The Declaration further proclaims that, "[b]oth aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights--even the right to life itself."²

Despite this strong language, the declaration does not specifically adopt the right to a clean environment, but rather suggests that the right to life cannot be realized without a quality environment.³ This realization has pushed several countries, including the U.S., toward recognizing and mitigating their environmental justice problems.

THE UNITED STATES: ESTABLISHING THE RIGHT TO A CLEAN ENVIRONMENT THROUGH THE ENVIRONMENTAL JUSTICE MOVEMENT.

The U.S. lacks explicit constitutional or statutory provisions guaranteeing the right to a clean environment. Specifically the National Environmental Policy Act (NEPA) makes it the

¹ U.N. CONFERENCE ON THE HUMAN ENVIRONMENT, principle 1 (1972) (meeting in Stockholm in June 1972). See also ALEXANDER KISS AND DINAH SHELTON, *INTERNATIONAL ENVIRONMENTAL LAW* 21 (Transnational Publishers, Inc.) (1991) (citing Principle 1 of the Stockholm Declaration as affirming "the right to freedom, equality and adequate conditions of life; the requirement of an adequate environment is viewed as a means to achieve the protection of that right").

² *Id.*

³ Dinah Shelton, *Human Rights, Environmental Rights, and the Right to Environment*, 28 STAN. J. INT'L L. 103, 110 (1991) (noting that Stockholm Declaration stops short of proclaiming right to environment, but instead implies that other rights cannot be enjoyed without clean environment).



"national policy [to] encourage productive and enjoyable harmony between man and his environment."⁴ This policy, however, has not been construed as a right to a clean environment. In fact, the acknowledgment of environmental rights has been slow in the U.S. As a result, most of the pressures to establish environmental rights have stemmed from the local and grassroots level.

In the U.S., minority,⁵ low-income,⁶ and unincorporated communities suffer the bulk of the nation's environmental problems and hazards.⁷ Through citizen suits and public complaints, local groups have supported the goal of securing environmental equity⁸ or equal rights to a clean environment for these under-represented peoples. As a result, many non-governmental organizations⁹ and citizens groups argue that the government must take proactive steps to

⁴ 42 U.S.C.S. § 4321 (1994).

⁵ A minority community is one where the population is at least 25% Black, Hispanic, Asian and Pacific Islander, American Indian, Eskimo, Aleut, or other non-white persons as classified by the U.S. Census Bureau. OFFICE OF ENVTL. EQUITY, U.S. ENVTL. PROTECTION AGENCY, ENVIRONMENTAL EQUITY HANDBOOK 2-5 (Sept. 1993) [hereinafter *Equity Handbook*].

⁶ Low-income communities are those with an aggregate mean income (for a family of four) equaling less than \$13,359. *Id.*

⁷ In 1983, the U.S. General Accounting Office (GAO) composed a detailed demographic study of four hazardous waste facilities located in the Southeastern United States. U.S. GENERAL ACCOUNTING OFFICE, SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH THE RACIAL AND SOCIO-ECONOMIC STATUS OF SURROUNDING COMMUNITIES 2 (1983).

⁸ Environmental equity is an *ideal*, requiring *equal* distribution of clean water, land, and air resources, regardless of race or economic status. See Rodolfo Mata, *Hazardous Waste Facilities and Environmental Equity: A proposed Siting Model*, 13 VA. ENVTL. L.J. 375, 376-377 (1994) (discussing importance of environmental equity in maintaining democratic society). There are "three basic conceptions of equality: equality of status or respect, equality of opportunity, and equality of result or outcome. The concept of environmental equity is consistent with these outcomes." *Id.* The term environmental racism implies a requirement of intentional discrimination for relief. A preferred term is environmental equity or justice which recognizes that minorities and low-income communities may bear a disproportionate burden of pollution, regardless of intentional discrimination.

⁹ The Lawyers' Committee for Civil Rights, The Alliance for Environmental Justice, and California Rural Legal Assistance are active in the environmental justice movement.



mitigate environmental inequities.¹⁰ The pursuit of the latter process is known as the environmental justice movement.¹¹

On February 11, 1994, President Clinton delivered Executive Order No. 12,898.¹² The President declared:

All Americans have a *right to be protected from pollution*--not just those who can afford to live in the cleanest, safest communities. Today, we direct Federal Agencies to make environmental justice a part of what they do.¹³

The Order was the first tangible step toward establishing a "right to be protected from pollution."¹⁴ The Order requires each Federal agency to "make achieving environmental justice part of its mission by identifying and addressing . . . [the] disproportionately high and adverse

¹⁰ See Richard J. Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection*, 87 NW. U. L. REV. 787, 788-789 (1993) (recommending creation of nexus between environmental protection policies and demands of such policies on poor populations). The U.S. government failed to consider the effects of environmental policies on poor and minority groups, before 1992. *Id.* The government must ensure that its administrative regulations and policies do not negatively impact underprivileged communities. *Id.* Environmental Justice has been defined by EPA as the fair treatment of all races, incomes, and cultures; essentially, U.S. laws, regulations, and policies should not negatively impact one person or group over another. *Equity Handbook*, *supra* note 1, at 2-5.

¹¹ U.S. ENVTL. PROTECTION AGENCY, DRAFT NO. 4, ENVIRONMENTAL JUSTICE STRATEGY (Feb. 3, 1994). On June 14, 1993, President Bill Clinton defined environmental justice as, "calling a halt to the poisoning and pollution of our poorest communities, from our rural areas to our inner cities." *Id.* at 3. Environmental justice objectives seek to *actively* discourage the siting of toxins, chemicals, and other hazardous wastes where low-income, powerless, or minority communities are disproportionately affected. *Id.*

¹² 59 Fed. Reg. 7629 (Feb. 11, 1994). See also President's Remarks on the Observance of Earth Day, 30 WEEKLY COMP. PRES. DOC. 865 (Apr. 21, 1994) (declaring importance of environmental justice in preventing "people from suffering and dying" of toxic and hazardous waste materials).

¹³ President's Statement on the Executive Order on Environmental Justice, 30 WEEKLY COMP. PRES. DOC. 283 (Feb. 11, 1994) (announcing signing of Executive Order No. 12,898) (emphasis added).

¹⁴ *Id.* Prior to Executive Order No. 12,898, neither Congress nor the President had provided guidance toward alleviating environmental inequities. Several state legislatures, however, had passed and introduced laws designed to address environmental justice issues. BARTON HACKER, CENTER FOR POLICY ALTERNATIVES, ENVIRONMENTAL JUSTICE: LEGISLATION IN THE STATES (September 1994) (citing efforts of 15 states to enact environmental justice legislation and resolutions).

100-100000

100-100000 100-100000 100-100000 100-100000



100-100000 100-100000 100-100000 100-100000
100-100000 100-100000 100-100000 100-100000
100-100000 100-100000 100-100000 100-100000



human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations."¹⁵

It was the President's intent that the Order be used in conjunction with Title VI of the Civil Rights Act of 1964.¹⁶ In a memorandum accompanying the Order, President Clinton advised, "each Federal agency [in accordance with Title VI] to ensure that all programs or activities receiving Federal financial assistance that affect *human health or the environment* do not directly, or [indirectly] use criteria, methods, or practices that discriminate on the basis of race, color, or national origin."¹⁷ The memorandum was designed to focus attention on laws which may aid agencies in implementing the Order.¹⁸

To date, the environmental justice movement has been the main force toward recognizing a right to a clean environment in the United States.

¹⁵ Exec. Order No. 12,898, 59 Fed. Reg. 7,629 (Feb. 1994).

¹⁶ 42 U.S.C. § 2000d. *See* President's Memorandum to Executive Agencies on Environmental Justice, (Feb. 11, 1994) (citing Title VI of Civil Right Act of 1964 as empowering legislation for achieving environmental justice objectives) [hereinafter President's Memorandum].

¹⁷ *Id.* (emphasis added).

¹⁸ *Id.*



INDIA: CONSTITUTIONAL AND JUDICIALLY ENFORCED RIGHTS TO A CLEAN ENVIRONMENT.

In contrast to the U.S., India has recognized a constitutional right to a clean environment.

Article 21 of the Indian Constitution states that, "No person shall be deprived of his life or personal liberty except according to procedure established by law."¹⁹ The Indian Supreme Court in *Subhash Kumar v. State of Bihar* (1991)²⁰ interpreted Article 21's "right to life" provision as guaranteeing a right to a clean environment; the court held:

[The] right to life is a fundamental right under Article 21 of the Constitution and it includes the right of enjoyment of pollution-free water and air for full enjoyment of life. . . . [A] citizen has the right to have recourse to Article 32 of the Constitution for removing the pollution of water or air which may be detrimental to the quality of life.²¹

The consequences and implications of the Court's decision are provocative when applied to the international arena. This is because most countries, including the U.S., recognize the right to life in their constitutions. If the Indian analysis is applied internationally, the explicit right to a clean environment could become elevated to the level of customary law. In this regard and in light of the Stockholm Declaration, Indian Courts have taken a leadership role in recognizing environmental rights.²²

In addition to Article 21, Article 51-A²³ of the Indian Constitution makes it the "duty of

¹⁹ INDIAN CONST. part III, art. 21 (1949).

²⁰ JT 1991(1) SC 77, per K.N. Singh and N.D. Ojha, JJ cited in Nandan S. Nelivigi et al., *India: The Judiciary and the Environment: Recent Trends and Developments*, 23 ENVTL. POL'Y & L. 102 n.14 (1993). See also Professors Hunter and Dileva, *Comparative Environmental Law Course Materials* 209 n.31 (1995) (citing *Kumar* case).

²¹ *Id.* at 210.

²² See Kiss, *supra* note 1, at 50 (citing India, Kenya, and Indonesia as environmental leaders).

²³ INDIAN CONST. part 4A, art. 51A (1949).



every citizen of India to protect and improve the natural environment. . . and to have compassion for living creatures." Originally, Indian scholars considered this right unenforceable due to the demographic and economic dynamics of India. In *M.C. Mehta v. Union of India* (1991),²⁴ however, the Indian Supreme Court issued detailed directions to local governments requiring the distribution and public broadcasting of environmental education-materials.²⁵ This holding not only makes Article 51-A enforceable, but it expands the right to a clean environment by empowering Indian citizens to protect and improve the environment for all creatures. The latter language, "for all creatures," is especially strong, because it is not just limited humanity, but to all living beings.

In many countries environmental rights are unenforceable and little more than constitutional dicta.²⁶ This is not the case in India. Since the early 1980's, the Indian judiciary has increased access to the courts for the purposes of enforcing environmental rights.²⁷ M.C. Mehta, a leading environmental litigator in India has been extremely successful in bringing environmental claims before the Indian judiciary. His efforts alone have resulted in several hazardous facility closures, including the recent closure of over 212 industrial plants in the vicinity of the Taj Mahal.²⁸ The citizen suits brought by M.C. Mehta and others have enforced environmental laws

²⁴ JT 1991(4) SC 531, *per* Ranganath Mishra, CJI, G.N. Ray and A.S. Anand, JJ. See Nelivigi *supra* note 20, at 103 n.16 (citing M.C. Mehta).

²⁵ *Id.*

²⁶ Margaret Bowman and David Hunter, *Environmental Reforms in Post-Communist Central Europe: From High Hopes to Hard Reality*, 13 MICH. J. INT'L L. 921, 930 (1992) (citing Poland's constitutional right to clean environment as merely political and not enforceable).

²⁷ See Hunter, *supra* note 20, at 211 (discussing liberalization of the Indian judiciary).

²⁸ The Indian Supreme Court order of August 1993, prompted by a petition from M.C. Mehta, resulted in the forced shut down of 212 industrial plants. *India: Supreme Court Orders Closure of 11 Industrial Plants*, INT'L ENVTL. DAILY (BNA), Apr. 8, 1994, available in LEXIS, Nexis Library, CURNWS File (citing one of many successful petitions by M.C. Mehta to Indian Supreme Court).



where the government has been unsuccessful.



POLAND: CONSTITUTIONAL QUAGMIRE WITH ENVIRONMENTAL RIGHTS.

In 1976 Poland, like India, adopted a constitutional provision guaranteeing its citizens the right to a clean environment.²⁹ Article 71 of Chapter VIII affords "[c]itizens of the Polish People's Republic... the right to take advantage of the natural environment and the duty to preserve it."³⁰ On first glance the term "take advantage"³¹ seems to suggest the right to exploit the environment. This interpretation is, in fact, the opposite of the intended meaning.³² The provision is intended to establish "a citizen's right to a clean environment."³³

The Polish constitutional guarantee to a clean environment, unlike the similar Indian provision, is relatively unenforceable. It is "essentially a political [right] not a legal one."³⁴ Moreover, because the current Polish constitution is being revised and revamped, it is unclear whether the new constitution will maintain the guarantee to a clean environment.

Simple economics are likely to keep the right to a clean environment out of the new constitution. The Polish Minister of Environmental Protection, Natural Resources and Forestry, estimates that cleaning up the Polish environment will cost over "260 billion U.S. dollars and take

²⁹ See Bowman, *supra* note 26, at 930 (discussing 1976 amendment establishing right to clean environment).

³⁰ POLISH CONST. ch. VIII, art 71 (as amended 1976).

³¹ *Id.*

³² The misinterpretation highlights one of the main problems with developing international environmental standards. Language used in one country cannot be used in another country. Environmental laws must be tailored to the culture, language, history, and social constructions of the country where it is to be applied. As a result, international scholars must take care when interpreting foreign environmental laws.

³³ Bowman, *supra* note 26, at 930.

³⁴ *Id.*



at least thirty years to complete."³⁵ Foreign assistance will be required for Poland to successfully implement its right to a clean environment.³⁶

In contrast to its constitution, post-communist Poland has developed certain statutory environmental protections which *are* enforceable.³⁷ These statutes include the Law on Nature Protection, New Environmental Impact Assessment Provisions, and Water Legislation.³⁸ While these laws aid in the regulation and preservation of the environment, they do not contain provisions establishing a right to a clean environment.³⁹ As a result, the future of this right in Poland remains in flux and uncertain.

³⁵ Comment, *Bridging the Gap in Eastern Europe: Forty Years of Communist Indifference and the New Environmental Realities in Poland*, 10 DICK. J. INT'L L. 159, 181 (1991) (citing *Ecology Policy* MINISTRY OF ENVIRONMENTAL PROTECTION, NATURAL RESOURCES AND FORESTRY 2 (Republic of Poland, 1990)).

³⁶ *Id.* at 182.

³⁷ Bowman, *supra* note 26, at 930 (stating that constitutional right to clean environment cannot be enforced in courts without enabling legislation).

³⁸ *Id.*

³⁹ See generally *id.* (discussing components and goals of Polish environmental laws).



BRAZIL: JUDICIAL ENFORCEMENT OF THE CONSTITUTIONAL RIGHT TO A CLEAN ENVIRONMENT.

In the same spirit as the U.S.'s NEPA,⁴⁰ Brazil's National Environmental Policy Act attempts to strike a healthy balance between man and the environment. Article 2 reads as follows:

[Brazil's] National Environmental Policy aims at the preservation, improvement and recuperation of the environmental quality of life, intending to assure... conditions [of] social and economic development... and the protection of the human life dignity. [sic]⁴¹

Brazil, however, has not limited itself to statutory environmental protections. In 1988, the state adopted its new Constitution. Like the Indian and Polish constitutions the Brazilian Constitution affirms the "right to an ecologically balanced environment. . . , [as] essential to the wholesome quality of life."⁴² In contrast to its Polish counterpart, the Brazilian Constitution is not merely a political document; it is enforceable.

Like India, Brazil's right to a clean environment first became enforceable through litigation in the courts. It is ironic, though, that the first case to challenge the Brazilian right to a clean environment was not from a Brazilian court. In 1985, the Inter-American Commission on Human Rights found, in the Yanomami Case,⁴³ that environmental degradation in the Amazon would diminish the Yanomami people's right to life.⁴⁴ While the Inter-American Commission's holding

⁴⁰ See *supra* p. 2 (discussing U.S. NEPA).

⁴¹ The National Environmental Policy Act, No. 6938, art 2 (1981) (Braz.).

⁴² BRAZIL CONST. ch. VI, art. 255.

⁴³ Case 7615, Inter-Am. C.H.R. 24, 28, 33, OEA/ser. L./V./11.66, doc. 10 rev. 1 (1985) [hereinafter Yanomami Case].

⁴⁴ See Gammie, *supra* note 48, at 615 (linking right to life of Yanomami people to clean environment).



lacked the force of law in Brazil, it spawned several citizen suits.⁴⁵ These local suits succeeded in enforcing Brazil's right to a clean environment.⁴⁶ Today, the Yanomami case is celebrated by Brazilian environmentalist as the main stimulus toward the recognition of the right to a clean environment.⁴⁷

Brazil's appreciation for environmental rights stems from its recognition of the nexus between environmental degradation and the rights of indigenous people.⁴⁸ This analysis closely resembles the U.S.'s environmental justice movement in that it focuses on the rights of minorities and low income people.⁴⁹ As a result of its constitutional and judicial framework, Brazil is considered to be a leader in environmental protection laws.⁵⁰

⁴⁵ Albert Ninio, expert on Brazilian Law, Apr. 24, 1995 (speaking in Comparative Environmental Law Course at Washington College of Law).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Beth Gammie, *Human Rights Implications of the Export of Banned Pesticides*, 25 SETON HALL L. REV. 558, 586 n.199 (1994) (noting link between environmental degradation and right to life threats).

⁴⁹ See *supra* p. 1 (examining U.S.'s environmental justice movement).

⁵⁰ See Ninio, *supra* note 45.



CHILE: THE RIGHT TO A CLEAN ENVIRONMENT AND ITS PROTECTIVE ACTION PROCESS.

In the fashion of Brazil and India, Chile has a constitutional right to a clean environment. Chapter III, Article 19(8) of the Chilean Constitution guarantees, "[t]he right to live in an environment free from contamination."⁵¹ Like Brazil and India, Chile has relied upon its judiciary to enforce its environmental laws and rights. This reliance, however, has not come by accident.

Article 20⁵² of the Chilean Constitution creates an enforcement provision called the "Protective Action"⁵³ process.⁵⁴ Under this process an individual may file a complaint with his/her respective Court of Appeals; upon review of the complaint the court may enforce the right to live in an environment free from contamination.⁵⁵ This specifically defined process is unique to Chile and is not found in either the Brazilian or Indian Constitutions. Article 20, is particularly important, however, given Chile's lack of any national environmental policy.⁵⁶

One of the most noted uses of this process stemmed from an action to stop hazardous waste dumping in Chanaral, Chile. Residents of Chanaral, a small fishing village, complained that Codelco, a state-owned copper mining company, was polluting their water.⁵⁷ In accordance

⁵¹ CHIL. CONST. ch. III, art. 19 (1980).

⁵² *Id.* at art. 20.

⁵³ Rafael Asenjo, *Innovative Environmental Litigation in Chile: The Case of Chanaral*, 2 GEO. INT'L ENVTL. L. REV. 99, 102 (1989) (citing constitutional provision, ch. III, art. 20, as empowering individuals to bring notice to Court of Appeals of violations to art. 19 rights).

⁵⁴ CHIL. CONST. ch. III, art. 20 (1980).

⁵⁵ *Id.*

⁵⁶ See Asenjo, *infra* note 53, at 102.

⁵⁷ Asenjo, *supra* note 53. The Cooper Corporation had contaminated the area through the release of copper tails. *Id.*



with the protective action process, the residents brought a case to the Court of Appeals of Copiapo. On June 23, 1988 the appellate court ordered Codelco to stop contaminating the Chanaral and the surrounding areas.⁵⁸

One month later, the Supreme Court of Chile upheld the appellate decision.⁵⁹ With the Supreme Court's affirmation of Article 19(8), the right to a clean environment appears to be firmly rooted in Chilean law.

⁵⁸ *Id.* at 107.

⁵⁹ *Id.* at 107, 108.



FRANCE: RESUMPTION OF NUCLEAR TESTING IN SOUTH PACIFIC.

On June 13, 1995 President Jacques Chirac stated that France will resume nuclear testing in part because of its premature halt of testing in 1992.⁶⁰ France has promised to sign a ban on testing in the fall of 1996, but not before conducting 8 nuclear tests.⁶¹

Since June the international community has aggressively opposed France's continued testing. The following is a short summary of opposition:

1. During the last weeks of July the Russian lower house passed a resolution in opposition to France's planned nuclear tests in the South Pacific.⁶²

2. On August 2, 1995, the Association of Southeast Asian Nations (ASEAN) strongly protested France's resumption of nuclear weapons. ASEAN is composed of 19 member nations including: Brunei, Indonesia, Malaysia, the Philippines, Singapore, Thailand and Vietnam.⁶³

3. Australian foreign minister Gareth Evans criticized and condemned any testing effecting "the world environment and humanity."⁶⁴

4. On August 2, 1995 Canada joined in opposition against the planned French tests.⁶⁵

5. On August 4, 1995 the World Wide Fund for Nature argued that "the blasts could affect the lives of local people, deep-sea and coral atoll ecosystems, as well as marine life and

⁶⁰ *Chirac: France Plans 8 More Nuclear Tests*, SUN-SENTINEL, June 14, 1995, at 1A.

⁶¹ *Id.*

⁶² *Russian Lower House Calls on France to Cancel Nuclear Tests*, AFX NEWS, July 20, 1995.

⁶³ K.T. Arasu, *France Blasted Over Nuclear Tests as ASEAN Talks*, REUTERS LTD. , August 2, 1995.

⁶⁴ *Australia Raps France Over Planned Nuclear Test, Ties Worsen*, DEUTCHE PRESSE-AGENTUR, August 2, 1995.

⁶⁵ Allan Thompson, *Canada Urges France to Stop Nuclear Tests*, TORONTO STAR, August 3, 1995, A17.



birds.”⁶⁶

6. In strong protest against the nuclear testing, both of Japan's legislative houses unanimously passed a resolution calling for the halt to all nuclear testing and condemning France's planned nuclear tests.⁶⁷

France's action threatens to derail two treaties: the Nuclear Non-Proliferation Treaty and the Comprehensive Test Ban Treaty.⁶⁸

⁶⁶ *WWF Urges France to Drop Plans for Nuclear Tests*, REUTERS WORLD SERVICE, August 4, 1995.

⁶⁷ *Japan Hits France's Nuclear Test Plan*, THE BOSTON GLOBE, August 5, 1995, 10.

⁶⁸ *Japan Urges France, China to Halt Nuclear Tests*, REUTERS LTD., August 4, 1995.

U.S. EPA Headquarters Library
Mail code 3404T
1200 Pennsylvania Avenue NW
Washington, DC 20460
202-566-0556