

# The Implementation of the Human Right to Water in Argentina and Colombia

## *La justiciabilidad del derecho humano al agua en Argentina y Colombia*

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**ABSTRACT:** The article deals with the recognition of access to water as a human right in various international legal instruments offering a comparative perspective from the practice in Argentina and Colombia. The essay explores the human right to water providing with new insights about the enforceability (referred to as “justiciability”) of the right to water in light of recent rulings issued by the Colombian Constitutional Court and different judgements by Argentine courts. In the analysis the authors further underline main obstacles in the enforcement of the human right to water and the challenges for its protection in the context of climate change.

**Key words:** right to water, International law, Human rights, Environmental Protection, Climate Change.

**RESUMEN:** El artículo aborda el reconocimiento del acceso al agua como derecho humano en diversos instrumentos jurídicos internacionales, ofreciendo una perspectiva comparativa de la práctica en Argentina y Colombia. El ensayo explora el derecho humano al agua proporcionando nuevos elementos de juicio acerca de la justiciabilidad del derecho al agua a la luz de recientes fallos emitidos por la Corte Constitucional colombiana y diferentes sentencias dictadas por tribunales argentinos. En el artículo las autoras subrayan los principales obstáculos en la justiciabilidad del derecho humano al agua y los desafíos para la protección en el contexto del cambio climático.

**Palabras clave:** derecho al agua, derecho internacional, derechos humanos, la protección del Medio Ambiente, Cambio Climático.

**RÉSUMÉ:** L'article aborde la reconnaissance de l'accès à l'eau comme un droit de l'homme dans plusieurs instruments juridiques internationaux en offrant une perspective comparative de la pratique en Argentine et en Colombie. Le travail explore le droit de l'homme à l'eau en fournissant des nouveaux éléments sur la justiciabilité du droit à l'eau à la suite de récentes jugements prononcés par des tribunaux argentins. Dans cet article les auteurs soulignent les principaux obstacles de la justiciabilité du droit de l'homme à l'eau et les défis pour la protection dans le contexte du changement climatique.

**Mots-clés:** droit à l'eau, droit international, droits de l'homme, protection de l'environnement, changement climatique.

## I. INTRODUCTION

According to the United Nations around 1.2 billion people live in areas of water scarcity, and another 1.6 billion people face economic water shortages.<sup>1</sup> In this context, access to water has recently emerged as a human right recognized at the universal level.<sup>2</sup> In 2002, the General Comment No. 15 of the UN committee on Economic, Social and Cultural Rights (CESCR) set out the right to water as the right of everyone “to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses”.<sup>3</sup> According to the General Comment, States “have to adopt effective measures to realize, without discrimination, the right to water”.<sup>4</sup>

Nevertheless people around the globe face up significant difficulties in their access to water. Indeed, the right to water is one of the constitutional guarantees which find many obstacles for its effectiveness both in developing and developed countries.<sup>5</sup> In 2000, over 1,000 million people lacked adequate water supply and several billion lacked access to adequate sanitation.<sup>6</sup> Besides, “the continuing contamination, depletion and unequal distribution of water is exacerbating existing poverty”.<sup>7</sup>

The difficulties of ensuring the effective implementation are also underlined in the 2006 Human Development Report “Beyond scarcity: Power, poverty and the global water crisis” of the United Nations Program for Development. This Report highlights “the deep inequalities in life chances that divide countries and people within countries on the basis of wealth, gender

<sup>1</sup> United Nations, *Water Scarcity*. Available at: <http://www.un.org/waterforlifedecade/scarcity.shtml>.

<sup>2</sup> Brown Weiss, E., “The Coming Water Crisis: A Common Concern of Humankind”, *Transnational Environmental Law*, 1:1, 2012, pp. 153-168.

<sup>3</sup> General Comment No. 15 (2002), Economic and Social Council, 20.01.2003, E/C.12/2002/11. Available at: <http://www.unhchr.ch/tbs/doc.nsf/0/a5458d1d1bbd713fc1256cc400389e94>.

<sup>4</sup> *Ibidem*, p. 2

<sup>5</sup> *Idem*.

<sup>6</sup> WHO, *The Global Water Supply and Sanitation Assessment 2000*, Geneva, 2000, p.1.

<sup>7</sup> General Comment No. 15.

and other markers for deprivation”.<sup>8</sup> To make things even more complex, the transnational environmental effects of climate change on water availability will worsen the current situation.

Taking into account all these circumstances, the justiciability of the right to water or, in other words, the effective access of citizens to safe water and sanitation is crucial.<sup>9</sup> The enforceability of the right to water and, in general, of Economic, Cultural and Social Rights (ECSR) is a transnational issue which has been raised by prominent scholarship over the past years.<sup>10</sup> In a future scenario of scarcity, the availability of international and national legal mechanisms for redress is critical. In this regard, transnational environmental law is shaping national environmental systems and case law. As a result, the international trend toward the recognition of the right to water is reflected also in national courts.

Latin America represents an interesting scenario to verify how these changes are being operated. Even in countries in which the right to water is not enshrined in the Constitution, national courts have upheld the right to water. The paper presents evidence that highlights the interlinked relationships among different environmental systems, turning the attention to the thorny issue of the enforceability of the right.

The first section presents an overview of the recognition of the access to water as a human right from a transnational environmental law perspective, identifying key controversial issues involved in the recognition of the right. The second section discusses the problems of access to water and the potential impact of climate change on water resources in Latin America. The third section is devoted to the review of the most relevant case law of Argentina’s national courts and the Colombian Constitutional Court. The final section reflects the authors’ conclusions.<sup>11</sup>

<sup>8</sup> Human Development Report 2006, at 27, available at <http://hdr.undp.org/en/media/HDR06-complete.pdf>.

<sup>9</sup> Chapple, Ellen & Leitch, Frances, “The Right to Water: Does it Exist and is it Justiciable Content?”, available at <http://law.anu.edu.au/coast/events/environment/papers/chapple&leitch.pdf>. “What price for the priceless?: Implementing the justiciability of the right to water”, 120 Harv. L. Rev. 1067 (2007), available at <http://hlr.rubystudio.com/media/pdf/note.pdf>.

<sup>10</sup> The IESCR article 20 underlines the obligation of each party “to take steps... to the maximum of its available resources with a view to achieving progressively the full realisation of the rights recognised in the Present Covenant”.

<sup>11</sup> Dr B. Olmos Giupponi has written the sections 2.3. and 4.1, M. Paz has contributed to section 4.2. Introduction and conclusions have been jointly written.

## II. THE INTERNATIONAL RECOGNITION OF THE ACCESS TO WATER AS A HUMAN RIGHT

The recognition of human right to water as such is rather recent.<sup>12</sup> As previous groundwork, it should be noted that different international instruments adopted in earlier decades contain references to the right to water.<sup>13</sup> Indeed, the need to ensure equitable access to water resources has been object of various regulations. In this vein, the UN convened the First World Conference on Water (Mar del Plata, 1977) and subsequently launched the International Decade of drinking water and sanitation 1981-1990, setting as a goal to ensure access to safe water for between 600 and 800 million people around the world.<sup>14</sup> In 1992 the International Conference on Water and the Environment established different principles, among which the one that states “fresh water is a finite and vulnerable resource, essential to sustain life, development and the environment”.<sup>15</sup>

At UN level the efforts undertaken by human rights bodies have resulted in binding and soft law instruments that recognize access to water as a human right. Among them the above mentioned 2002 General Comment No. 15 on the right to water.<sup>16</sup> Even if the Comment has a soft law nature, it defines the parameters to be met in the access to water for personal and domestic uses: accessibility, affordability, accessible and non-discrimination.<sup>17</sup>

<sup>12</sup> See, among others: A. Boyle, “Human Rights and the Environment: A Reassessment - First Preparatory Meeting of the World Congress on Justice, Governance and Law for Environmental Sustainability”, available at: <http://www.unep.org/dec/worldcongress/docs/Towardsthedclarationhumanrights.pdf>. Anand, P. B., “Right to water and access to water: an assessment”, *J. Int. Dev.* 19, 2007, pp. 511-526.

<sup>13</sup> Freestone, David and Salman, M. A., “Ocean and Freshwater Resources”, in Bodanszy, Brunée and Hey (eds.), *The Oxford Handbook of International Environmental Law* (Oxford, 2009) pp. 337-361.

<sup>14</sup> Attila, T. and Arcari, M., *The UN Convention on the Law of International Watercourses*, The Hague, Kluwer, 2001.

<sup>15</sup> The Dublin Statement on Water and Sustainable Development a meeting of experts on water related problems that took place on the 31st of January 1992 at the International Conference on Water and the Environment (ICWE), Dublin, Ireland, organized on 26-31 January 1992.

<sup>16</sup> UN Doc E/C.12/2002/11.

<sup>17</sup> General Comment No. 15 (2002), para. 2.

The right creates an obligation to respect, protect and fulfil by the States. Whereas the obligations to respect and protect involve a negative dimension, the obligation to fulfil implies an active dimension.

As for the binding instruments, while the International Covenant on Civil and Political Rights does not expressly recognize the right to water, other human rights treaties do include an explicit recognition of the right to water.<sup>18</sup> In this regard, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) provides in Article 14 paragraph 2 (h) that States Parties shall ensure to women the right to “enjoy adequate living conditions, particularly in relation to... water supply”.<sup>19</sup> Furthermore, the Convention on the Rights of the Child in paragraph 2 (c) of Article 24 requires States parties to combat diseases and malnutrition “through the provision of adequate nutritious foods and clean drinking-water”.<sup>20</sup> Similarly, the Convention on the Rights of Persons with Disabilities in Article 28.2.a) sets out the obligation of States to “ensure equal access for people with disabilities to clean water services”.<sup>21</sup>

In this evolution of the right to water, the 2010 resolution of the General Assembly on ‘The human right to water and sanitation’, underlined the scope and nature of the right.<sup>22</sup> This resolution is a step in the right direction and represents the consensus of the international community expressed through the favourable votes on the resolution.<sup>23</sup>

<sup>18</sup> Various organizations have advocated for an international convention on the right to water. See <http://www.watertreaty.org/>.

<sup>19</sup> The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted in 1979 by the UN General Assembly, available at <http://www.un.org/womenwatch/daw/cedaw/>.

<sup>20</sup> Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989. Entry into force 2 September 1990, available at: <http://www2.ohchr.org/english/law/crc.htm>.

<sup>21</sup> The Convention on the Rights of Persons with Disabilities was adopted on 13 December 2006 during the sixty-first session of the General Assembly by resolution A/RES/61/106. The Convention and its Optional Protocol opened for signature by all States and by regional integration organizations at United Nations Headquarters in New York on 30 March 2007. Available at <http://www.un.org/disabilities/convention/conventionfull.shtml>.

<sup>22</sup> Resolution A/64/L.63/Rev.1. The human right to water and sanitation, of July 26, 2010, available at [http://www.internationalwaterlaw.org/documents/intldocs/UNGA\\_Resolution\\_HR\\_to\\_Water.pdf](http://www.internationalwaterlaw.org/documents/intldocs/UNGA_Resolution_HR_to_Water.pdf).

<sup>23</sup> This resolution was backed by the majority of UN Member States. It was adopted by 122 votes in favour, none against and 41 abstentions.

In addition to these international human rights instruments, the legal basis for the right to water arises from human rights and guarantees as enshrined in national constitutions.<sup>24</sup> Thus the right to water has been recognized directly or indirectly in different national constitutions, among them, for instance, the constitutions of South Africa, Ethiopia, Kenya, Bolivia, Ecuador and Uruguay encompass the right to water, whereas the constitutions of Gambia, India, Venezuela, Spain and Belgium provide for an indirect recognition.<sup>25</sup>

One of the most advanced constitutions in the matter, the Constitution of South Africa embodies the obligation of natural and legal persons to respect the right to water. In particular, Article 27 (1) (b) establishes the right of everyone to “access to sufficient water”.<sup>26</sup> Similarly, in Latin America, Uruguay’s Constitution in Article 47, states that “water is an essential resource for life” and that “access to water and sanitation” are human rights.<sup>27</sup> In Europe, Belgium recognizes the right to water in the three regions, while in Spain it is enshrined within the powers assigned to municipalities.<sup>28</sup> In India, several courts have endorsed the right to water in the broader context of right to life recognized in Article 21 of the Constitution of India.<sup>29</sup>

In sum, the right to water has arisen as the right of individuals to have equal access to sufficient water. Accessibility needs to be guaranteed in different ways, namely: physical accessibility (appropriate quantity and quality) and affordability. These requirements concerning the right to water must be determined in light of the practice. As for the quantity, there is no international consensus on how many litres per day a person needs to satisfy basic survival and health needs. In the case *Mazibuko v. City of Johannesburg*, the South African Constitutional Court determined that the neces-

<sup>24</sup> General Comment No. 15 (2002), para 3.

<sup>25</sup> Constitution of Uruguay, article 47.

<sup>26</sup> Constitution of South Africa promulgated 18 December 1996, in force since 4 February 1997. Available at <http://www.info.gov.za/documents/constitution/1996/a108-96.pdf>.

<sup>27</sup> 1967 Constitution of Uruguay (last amended 2004), Article 47, available (in Spanish) at: <http://pdba.georgetown.edu/Constitutions/Uruguay/uruguay04.html>. Author’s translation.

<sup>28</sup> See C. Armeni, “The right to water in Belgium”, *IELR Briefing Paper 2008-2*, available at <http://www.ielrc.org/content/f0802.pdf>. See also 1978 Spanish Constitution, articles 148.1.10 and 149.1.22.

<sup>29</sup> 1949 Constitution of India, article 21. Protection of life and personal liberty.

sary quantity was 25 litres per person per day or 6 kilolitres per household per month.<sup>30</sup> With regard to the quality water must be safe, in other words free from micro-organisms, chemical substances and radiological hazards that constitute a threat to a person's health. Water must be accessible from an economic viewpoint, i.e. water tariffs should not be excessively applied. Finally, non-discrimination and access to information must be respected in the implementation of the right.

Yet there are questions regarding the implementation of the right which remain open. First of all, there are still disagreements among States upon the recognition right to have equal access to water, partly because there is no binding international instrument in this regard.

Secondly, it is necessary to determine in each case who is entitled to the right, who is supposed to guarantee it and who has legal standing. On the one hand, national legal systems have accommodated a new right, but its contours must be defined by courts. On the other hand, as seen before, the right to water creates the obligations to respect, protect and fulfil on the part of the State. The question whether or not these obligations should be applied to non-state actors, such as multinational corporations seems more debatable.<sup>31</sup>

The third question concerns the implementation or the adoption of measures to ensure effective access to safe water and sanitation.<sup>32</sup> This requires the enforcement of the right at national level, granting an effective judicial protection.<sup>33</sup> This leads to the question of the "justiciability" of the right to water, which involves the activity of judicial bodies and various enforcement mechanisms designed to protect the right.<sup>34</sup> Where the right to wa-

<sup>30</sup> *Mazibuko and Others v City of Johannesburg and Others* (CCT 39/09) [2009] ZACC 28; 2010 (3) BCLR 239 (CC) ; 2010 (4) SA 1 (CC) (8 October 2009). Southern African Legal Information Institute. Available at <http://www.saflii.org/za/cases/ZACC/2009/28.pdf>.

<sup>31</sup> Letnar Cernic, J., "Corporate obligations under the human right to water", *Denver Journal of International Law and Policy*, Band 39 Nr. 2, March 2011.

<sup>32</sup> Pejan, R., "The Right to Water: the Road to Justiciability", 36 *Geo. Wash. Int'l L. Rev.* (2004), pp. 1181.

<sup>33</sup> See *Harvard Law Review*, "What price for the priceless?: Implementing the justiciability of the right to water", *supra* at 14.

<sup>34</sup> These mechanism provide for a rapid defence of the human right at stake. In the American doctrine and in common law in general, they are equivalent to "writ of certiorari". In Latin America these "writs" have different names such as acción de tutela, recurso o acción de amparo.



ter is explicitly recognized in the Constitution, national courts (especially Constitutional Courts or Supreme Courts) ensure that it is respected in case of violation.<sup>35</sup> Where the right to water is not explicitly recognized in the Constitution, national courts provide an authoritative interpretation protecting the right to water through the recognition of other rights, namely the right to life or to a healthy environment.

### III. RIGHT TO WATER AND CLIMATE CHANGE

According to the Intergovernmental Panel on Climate Change (IPCC)'s forecasts, future climate change will produce negative effects on access to water in certain regions.<sup>36</sup> In particular, areas especially vulnerable (such as deserts or coastal areas) and large cities will lack water resources in the future.<sup>37</sup> In Latin America it is expected that a significant proportion of the population will be affected by water shortages.<sup>38</sup> Different UN agencies have stressed the need to guarantee access to safe water and sanitation in the context of climate change. In this regard it is worth mentioning the Human Rights Council Resolution 7/23 "Human rights and climate change", the report of the Office of the High Commissioner for Human Rights —OHCHR— on the relationship between climate change and human rights (2009) and the Human Development Report 2007/08 UNDP, "Combating climate change: Human solidarity in a divided world".<sup>39</sup>

As for the relations between the right to water and climate change, the OHCHR Report underlined the negative impact of climate change on

<sup>35</sup> Marauhn, Th., "Changing Role of the State", in Bodansky *et al.* (eds), *The Oxford Handbook of International Environmental Law*, pp. 727-748, at 735.

<sup>36</sup> Climate Change and the Human Rights to Water and Sanitation, Position Paper available at [http://www.ohchr.org/Documents/Issues/Water/Climate\\_Change\\_Right\\_Water\\_Sanitation.pdf](http://www.ohchr.org/Documents/Issues/Water/Climate_Change_Right_Water_Sanitation.pdf).

<sup>37</sup> Brown Weiss, E., "The coming water crisis: A common concern of humankind", *Transnational Environmental Law*, 1:1, 2012, pp. 153-168.

<sup>38</sup> UNFCCC, *Impacts, Vulnerabilities and Adaptation in Developing Countries*, 2007.

<sup>39</sup> Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights, A/HRC/10/6, 15 January 2009 available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/103/44/PDF/G0910344.pdf?OpenElement>. The Resolution is available at [http://ap.ohchr.org/documents/E/HRC/resolutions/A\\_HRC\\_RES\\_7\\_23.pdf](http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_7_23.pdf).

the access to water.<sup>40</sup> According to this report, climate change will, and already does, impact on people's rights to water and sanitation by causing floods and droughts, changes in precipitation and extreme temperatures that result in water scarcity, contamination of drinking water and exacerbation of the spread of diseases.<sup>41</sup> Besides, in the report *Climate Change and Human Rights Water and Sanitation* (2010) the independent expert noted "the need to promote a human rights approach based on integrated management of water resources, with emphasis on participation, not discrimination, and accountability".<sup>42</sup>

One particular aspect concerns climate change negative effects on the right to water as human rights violations. There are the additional problems of causality and burden of the proof.<sup>43</sup> Some cases give a clear example of these obstacles. Recently in Costa Rica, different complaints relating to negative impact of climate change were submitted before the Supreme Court, claiming for the State's responsibility in building appropriate infrastructure and diminishing the risks and damages caused by tropical storms which have been increased dramatically over the past years.<sup>44</sup> In their petition to the Inter American Commission of human rights, the Inuit people sought relief from violations resulting from global warming caused by acts and omissions of the United States, however, the Inter-American Commission declared that it was not possible to determine the causality link (2005).<sup>45</sup> The complaints submitted at internal level have failed because of the difficulty of demonstrating the causal link and the absence of evidence of environmental damage.

<sup>40</sup> The Report of the Office of the United Nations High Commissioner for Human Rights —OHCHR— on the relationship between climate change and human rights (2009), underlined the negative impact of climate change on the access to water. UNDP 2007/08 Human Development Report: Fighting Climate Change: Human Solidarity in a Divided World.

<sup>41</sup> *Idem*.

<sup>42</sup> *Climate Change and the Human Rights to Water and Sanitation*. Position paper, available at: [http://www.ohchr.org/Documents/Issues/Water/Climate\\_Change\\_Right\\_Water\\_Sanitation.pdf](http://www.ohchr.org/Documents/Issues/Water/Climate_Change_Right_Water_Sanitation.pdf).

<sup>43</sup> Spain, A., "Beyond Adjudication: Resolving International Resource Disputes in an Era of Climate Change", *Stanford Environmental Law Journal*, vol. 30, no. 2, 2011, pp. 343-390.

<sup>44</sup> See Exp.10-016575-0007-CO/Res. N° 2011005052 (15/04/2011) and Exp.11-009595-0007-CO/Res. N° 2011012282 (09/09/2011). Constitutional Chamber of the Supreme Court. San José.

<sup>45</sup> Translations from Spanish to English are made by the authors unless otherwise noted.

In Latin America, while water resources are abundant (the region is estimated to have 35% of freshwater around the world) a significant percentage of the population has no access to safe water and sanitation (only 20% of the population has access to adequate sanitation). One of the main reasons for this situation is the deficient management of water resources. Therefore, a considerable number of Latin American countries face the same problems as countries with chronic water shortages. Nearly 13.9% of the population of Latin America (71.5 million people) lack access to potable water, 63% of this population (45 million people) live in rural areas.<sup>46</sup> The unequal access to water is related also to the broader issue of equity in the region. Also, many rural communities depend on limited freshwater resources (surface and groundwater) and many others rely on rainwater, using collection methods that are highly vulnerable to droughts.<sup>47</sup>

The main problems are difficult physical access, economic affordability and pollution. There is a large water pricing inequality, for instance in 2000, statistics show that poor people paid between 1.5 and 2.8 times more for their water than non-poor families.<sup>48</sup> Besides, the quality of the water received by the poor was also much worse, increasing the danger of diseases. There are problems of over-exploitation and pollution of groundwater, as well as lakes and river pollution. Furthermore, hurricanes (particularly in Central America) and the effects El Niño provoke have devastating consequences, which will be worsening if the forecasts take place.<sup>49</sup>

In the future scenario of climate change, it is estimated that in Latin America the number of people experiencing water stress will represent between 12 and 81 million in the 2020s, and from 79 to 178 million in the early 2050.<sup>50</sup> The current vulnerabilities observed in many regions of Latin America will increase due to the negative effect caused by a growing demand for water supply for irrigation and domestic uses, due to population

<sup>46</sup> IPCC, 2007-BID, 2004.

<sup>47</sup> *Ibid.*

<sup>48</sup> World Water Council (4<sup>th</sup> World Water Forum)-Comision Nacional del Agua, 'Water Problems in Latin America' (2004). Available at [http://www.worldwatercouncil.org/fileadmin/WWC/News/WWC\\_News/water\\_problems\\_22.03.04.pdf](http://www.worldwatercouncil.org/fileadmin/WWC/News/WWC_News/water_problems_22.03.04.pdf).

<sup>49</sup> *Idem.*

<sup>50</sup> IPCC Fourth Assessment Report: Climate Change 2007. Climate Change 2007: Working Group II: Impacts, Adaptation and Vulnerability. 13.4.3 Water resources. Available at [http://www.ipcc.ch/publications\\_and\\_data/ar4/wg2/en/ch13s13-4-3.html](http://www.ipcc.ch/publications_and_data/ar4/wg2/en/ch13s13-4-3.html).

growth and drought conditions in several hydrological basins.<sup>51</sup> Thus, the problems related to water access will be accentuated with climate change. As for the lack of access to drinking water, climate change will have an impact on water and sanitation infrastructure, increasing pollution cases. With respect to the affordability, climate change will provoke water tariffs increases.

Given these challenges, the main issues are those regarding the extension of access to water for most of the population and the means to ensure such access in the future. One of the major difficulties observed in Latin American countries, consists in the definition of a clear strategy implementing the right to water, taking into account the forecasts about the negative impacts of climate change, and adopting appropriate preventive measures for future scenarios of shortages in their national adaptation plans.

#### IV. JUSTICIABILITY OF THE RIGHT TO WATER IN ARGENTINA AND COLOMBIA

In Latin America the right to water is closely linked to water management and the protection of constitutional rights. In the last years, some Latin American countries reformed their constitution to enshrine explicitly the right to water like in México (2012), Bolivia (2009), Ecuador (2008) and Uruguay (2004).<sup>52</sup> Other Latin American constitutions include an indirect recognition of the right such as those of Guatemala, Chile and Venezuela.

Different cases relating to the access to water have arisen in the case law of judicial and arbitration bodies with various landmark rulings.<sup>53</sup> Some of these cases have been highly controversial, such as the construction of a hydroelectric dam in the Chilean Patagonia, the privatization of water and

<sup>51</sup> *Idem*.

<sup>52</sup> Constitution of Bolivia, "Article 16. I. Everyone has the right to water...", available at <http://pdpa.georgetown.edu/Constitutions/Bolivia/bolivia09.html>. Constitution of Ecuador, "Article 12. The human right to water is essential and cannot be waived. Water constitutes a national strategic asset for use by the public and it is unalienable, not subject to a statute of limitations, immune from seizure and essential for life", available at <http://pdpa.georgetown.edu/Constitutions/Ecuador/english08.html>. Constitution of Uruguay, see *supra* note 27.

<sup>53</sup> Romano, C., "International Dispute Settlement", in Brunée and Hey (eds.), *The Oxford Handbook of International Environmental Law*, Oxford, 2009, pp. 1036-1056.

increased water prices in Cochabamba (Bolivia), economic crisis and rising water rates (Argentina) or the Baba dam project in Ecuador. These cases show how common environmental legal principles and norms in national, international and transnational levels converge to protect the right to water.

As for the justiciability of the right to water in Latin America, there are different “models”. There are countries where the right to water is protected in the Constitutions, being directly enforceable before the courts. In other countries the right is not enshrined in the Constitutions, notwithstanding, courts have upheld the right to water. This second group includes countries like Argentina and Colombia where the right to water was successfully made justiciable.

In the following sections, landmark rulings relating to the justiciability of the right to water in these two countries are analysed. The remarks are followed by a summary of the main substantive points and the contribution the findings make to the case law in this field. Issues of broader importance to the evolution of transnational environmental law are also highlighted.<sup>54</sup>

### 1. *The Justiciability of the Right to Water in Argentina’s National Jurisdiction*

According to the environmental organization Green Cross Argentina, is estimated that 11 per cent of the population still does not have access to potable water in the country.<sup>55</sup> Besides, there are different challenges concerning the access to safe drinking water and sanitation, such as internal disparities among the different provinces and districts, lack of appropriate infrastructure and water management.

In Argentina, the human right to water and sanitation as such has no explicit recognition. However, this right is envisaged as part of the right to a healthy environment, protected in t Article 41 of the Constitution.<sup>56</sup> Additionally, under Article 75 inc. 22 of the Constitution, the main interna-

<sup>54</sup> Bodansky, D., “Is There an International Environmental Constitution?”, 16 Ind. J. Global Legal Stud. 565 (2009), pp. 565-584.

<sup>55</sup> Green Cross Argentina, Panorama General en la Argentina (Water: a General Overview in Argentina), available at <http://www.greencross.org.ar/downloads/LibroAguaaimprimweb.pdf>.

<sup>56</sup> Article 41. See Argentine Constitution available at <http://www.senado.gov.ar/web/interes/constitucion/english.php>.

tional human rights treaties enjoy constitutional hierarchy.<sup>57</sup> Thus, the right to water is implicitly recognized through universal and regional human rights instruments.<sup>58</sup> Moreover, the right to water is further guaranteed in internal laws and regulatory frameworks for public services.<sup>59</sup>

The right to water is made justiciable through ordinary and especial remedies (acción de amparo) before national courts and the Supreme Court as guardian and the Constitution's final interpreter and, also, through appropriate monitoring procedures before international bodies.<sup>60</sup> The following sections discuss the major milestones in the justiciability of the right to water in Argentine courts' case-law.<sup>61</sup>

<sup>57</sup> Article 75, inc. 22... The American Declaration of the Rights and Duties of Man; the Universal Declaration of Human Rights; the American Convention on Human Rights; the International Pact on Economic, Social and Cultural Rights; the International Pact on Civil and Political Rights and its empowering Protocol; the Convention on the Prevention and Punishment of Genocide; the International Convention on the Elimination of all Forms of Racial Discrimination; the Convention on the Elimination of all Forms of Discrimination against Woman; the Convention against Torture and other Cruel, Inhuman or Degrading Treatments or Punishments; the Convention on the Rights of the Child; in the full force of their provisions, they have constitutional hierarchy, do not repeal any section of the First Part of this Constitution... See Argentine Constitution available at <http://www.senado.gov.ar/web/interes/constitucion/english.php>.

<sup>58</sup> American Convention on Human Rights, adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969, in force since 18 July 1978, available at <http://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm>. Additional Protocol to the American Convention on human rights in the area of economic, social and cultural rights "Protocol of San Salvador", adopted 11/17/88 and in force since 11/16/99, article 11 (1) '[e]very shall have the right to live in a healthy environment and to have access to public services', available at <http://www.oas.org/juridico/english/sigs/a-52.html>.

<sup>59</sup> For instance, the Regulatory Framework of the Concession Services Provision of Potable Water and Sewage Services in the province of Buenos Aires (Ley 26.221-13/02/2007).

<sup>60</sup> According to Article 43, any individual could file "a prompt and summary proceeding regarding constitutional guarantees, provided there is no other legal remedy, against any act or omission of the public authorities or individuals which currently or imminently may damage, limit, modify or threaten rights and guarantees recognized by this Constitution, treaties or laws, with open arbitrariness or illegality". See Argentine Constitution available at <http://www.senado.gov.ar/web/interes/constitucion/english.php>.

<sup>61</sup> This is a revised version of the part of the analysis that has been published on line in *Rethinking Development and Inequality* Vol. 3 (2014).

## A. *Access to Water as a Human Right*

In recent years there have been lawsuits on the access to water as a human right.<sup>62</sup> In a leading case before the Supreme Court, Matanza-Riachuelo (2008), the Court referred to water pollution in a specific watershed in Buenos Aires (Matanza-Riachuelo) and the protection of the environment, stressing the need to defend the collective “common and indivisible use” of the environment.<sup>63</sup> The Supreme Court established the watershed authority’s obligation to meet a strict basin’s comprehensive sanitation program which included “the expansion of the drinking water supply... sewage and sanitation systems...”.<sup>64</sup>

The case Quevedo *et al.* (2001) dealing with water cuts for non-payment, a circuit judge adopted a protective measure considering the cuts unjustified and as a violation of constitutional rights.<sup>65</sup> In the case of access to water of Kaxipayiñ Paynemil Communities (1999), several courts of the Province of Neuquén stressed the importance of granting effective protection to the human right to water. The claim was made to safeguard

<sup>62</sup> See, for instance: Menores Comunidad Paynemil *s/ acción de amparo*, Expte 111-CA-Sala Civil, Cámara de Apelaciones en lo Civil, Neuquén, 19 de mayo de 1997; Colonia Valentina Norte, Defensoría de Menores N3 *c/ Poder Ejecutivo Municipal s/ acción de amparo*, Expte. 46/99, Acuerdo del Superior Tribunal de Justicia de Neuquén, 2 de marzo de 1999. Quevedo, Miguel Angel y Otros *c/ Aguas Cordobesas S.A. Amparo*, Córdoba, Juez Sustituto de Primera Instancia en lo Civil y Comercial N 51, 8 de abril de 2001. Caso Matanza Riachuelo. “Asociación Civil por la Igualdad y la Justicia (ACIJ) *c. Ciudad de Buenos Aires*” (18/07/2007) de la Cámara de Apelaciones en lo Contencioso Administrativo y Tributario de la Ciudad Autónoma de Buenos Aires, Sala I; los casos “Defensoría de Menores N° 3 *c. Poder Ejecutivo Municipal*” (“Colonia Valentina Norte Rural”) (02/03/1999) del Tribunal Superior de Justicia de la Provincia del Neuquén; el caso “Urriza, María Teresa *c/ ABSA s/ amparo*” (21/03/2005) del Juzgado Contencioso-administrativo N° 1 de La Plata y el caso “Usuarios y consumidores en defensa de sus derechos *c/ Aguas del Gran Buenos Aires*” (21/08/2002) del Juzgado de Paz de Moreno.

<sup>63</sup> CSJN, “Mendoza, Beatriz Silvia y otros *c/ Estado Nacional y otros s/ daños y perjuicios* (daños derivados de la contaminación ambiental del Río Matanza - Riachuelo)” (8/7/2008), Fallos 331:1622. Causa Mendoza, fs. 75/76.

<sup>64</sup> Supreme Court, “Mendoza, Silvia Beatriz *et al / National Government and other s / damages* (damages resulting from pollution of the River Matanza - Riachuelo)” (08/07/2008) 331:1622.

<sup>65</sup> Quevedo, Miguel Angel y Otros *c/ Aguas Cordobesas S.A. Amparo*, Córdoba, Juez Sustituto de Primera Instancia en lo Civil y Comercial N 51, 8 April 2001.

the right to health of children from indigenous communities who were at stake because of a pollution incident, requesting immediate provision of adequate water. Also, it is worth mentioning the case Colonia Valentina Norte (1999) before the High Court of Justice of the Province of Neuquén, in which the Court granted protection to children who drank water contaminated by hydrocarbons.<sup>66</sup>

### B. *Equitable Access to Water and Sanitation*

Several judgements have dealt with effective access to water, guaranteeing the equal access when economic obstacles or poor living conditions made it impossible or extremely difficult.<sup>67</sup> The case Quevedo focused on socio-economic difficulties to pay the tariff during the economic emergency in 2001, due to the difficult situation faced by the applicants who were unemployed.<sup>68</sup> The judge underlined that access to water is "... a collective need that cannot be interrupted... The service must be provided in equal and uniform conditions, being the provision mandatory and enforceable by users".<sup>69</sup> In the case of Kaxipayiñ Paynemil Communities, the court considered the severity of the situation, the urgency in protecting the rights at stake and the vulnerability of the affected group, in order to determine the government's responsibility in adopting appropriate measures.<sup>70</sup>

### C. *Quality and Quantity of Drinking Water*

The qualitative and quantitative parameters that must be met in the provision of drinking water were also analysed by Argentine courts. In terms of water quality, it is worth noting that the Food Code<sup>71</sup> determines the chemical characteristics of drinking water.<sup>72</sup> With respect to the quantity,

<sup>66</sup> Case "Defensoría de Menores N° 3 c. Poder Ejecutivo Municipal" (02/03/1999). Neuquén's High Court based arguments on the Constitution and the United Nations Convention on the Rights of the Child.

<sup>67</sup> In the Case of Quevedo (2001) the difficulty presented was economic.

<sup>68</sup> *Idem*.

<sup>69</sup> *Idem*.

<sup>70</sup> The effective action of the Minors Public Prosecutor to address an issue highly technical overcome the obstacles to grant the protection.

<sup>71</sup> Decree-Law n° 18284, published on July 28, 1969.

<sup>72</sup> According to the National Food Code (Law 18,248), section 982: "With the names of



as the UN Special Rapporteur highlighted in 2004 “in Argentina, courts have ordered the government and service providers to provide a minimum amount of water (between 50 and 100 litres per person per day) regardless of the ability to pay the person possesses”.<sup>73</sup> In order to comply with these requirements, the regulatory frameworks have included direct obligations for water suppliers.<sup>74</sup>

The case *Kaxipayiñ Paynemil* involved the consumption of water contaminated by lead and mercury. The state’s court ordered the province’s authorities to: provide 250 liters of water daily per capita; determine whether there was contamination; make the necessary health treatments and adopt the necessary measures to stop the pollution.<sup>75</sup> In *Colonia Valentina Norte*, the High Court upheld the decision of circuit appellate court, requiring the state to provide 100 liters of drinking water per day to each member of the families living in the colony and to guarantee that the poorest members could store water safely.<sup>76</sup>

In *Quevedo*, the judge found that the concessionaire “... in exercise of powers under the regulatory framework..., proceeded to restrict water supply to around 80 litres per day, despite being entitled to reduce it to 50 litres”.<sup>77</sup> Similarly, the Supreme Court of the Province of Buenos Aires in the case *Boragina and Iudica* (2009),<sup>78</sup> referring to the quality parameters of drinking water and the protection of the right to health, stated: “up to the date... the respondent, in charge of water supply, continues to provide

public drinking water supply and drinking water for home use, it is understood that is suitable for food and home use shall not contain substances or bodies strange biological, organic, inorganic or radioactive tenors such that make it dangerous to health. You must submit taste nice and be almost colourless, odourless, clear and transparent. Drinking water for home use is the water from a public supply of a well or other source, located in reservoirs or tanks home”.

<sup>73</sup> Final Report of the Special Rapporteur on relationship between the enjoyment of economic, social and cultural rights and the promotion of the right to drinking water and sanitation, E/CN.4/Sub.2/2004/20, 14 July 2004.

<sup>74</sup> For example, in the province of Buenos Aires, through regulation of the “Appropriate Levels of Service”.

<sup>75</sup> *Judgement Comunidades... Véase supra.*

<sup>76</sup> *Judgement Colonia Valentina Norte. Véase supra.*

<sup>77</sup> *Judgement Quevedo y otros. Véase supra.*

<sup>78</sup> The different Argentine provinces have joined this body of law, our law 13,230. However, although the organization of the Standing Committee on Standards of potability through decree 3289/2004 (BOP: 14-I-2005), it has the sanction of minimum quality parameters referred to the cited articles . 8 inc. a. and 33 of dec. 878/2003.

a lower quality than expected... *the compliance with legal limits on carcinogens cannot be postponed indefinitely*".<sup>79</sup>

**D. Right to Water and Access to Justice for Communities in Vulnerable Circumstances**

In the case Kaxipayiñ Paynemil Communities, the protection was granted to children belonging to the Mapuche indigenous community living in a precarious situation. As a protective measure the judge ordered state to provide drinking water and appropriate medical care. In the case Matanza-Riachuelo, citizens were located in a marginal urban area, resulting in a vicious circle between waste pollution, lack of resources and denial of adequate access to safe water and sanitation. In another case before the Supreme Court, "*Defensor del Pueblo de la Nación c. Estado Nacional y otra*" (2007) access to safe water was granted to Toba indigenous people who found themselves in a vulnerable situation.<sup>80</sup> The Ombudsman's Office decided to initiate a protective action against the province of Chaco and the federal government, to proceed urgently to "modify the current living conditions of indigenous people *that...* due to repeated and systematic omissions incurred by the defendants to provide adequate humanitarian and social assistance, were in a state of silent, progressive, systematic and inexorable extermination".<sup>81</sup> The Supreme Court decided to adopt different measures aimed to improving living conditions including access to safe water and sanitation.<sup>82</sup> Also, in the case Colonia Valentina Norte, the High Court upheld the court of appeal's decision, pointing the state's duty to provide access to water in sufficient quantity and appropriate quality conditions.<sup>83</sup>

<sup>79</sup> SCBA, C 89298 S 15-7-2009, "Boragina, Juan Carlos; Miano, Marcelo Fabián y Iudica, Juan Ignacio c/ Municipalidad de La Plata s/ Amparo".

<sup>80</sup> CSJN, "Defensor del Pueblo de la Nación c. Estado Nacional y otra" (18/09/2007), Fallos: 330:4134. The judgement is available electronically on the website of the Foundation for the Study and Dissemination of Comparative Law (Fundación para el Estudio y Difusión del Derecho Comparado): <http://www.derecho-comparado.org/sentencias/argTobas.htm>.

<sup>81</sup> *Ibidem*. The quotation marks are excerpts from the opinion of the Attorney General's Office.

<sup>82</sup> CSJN, "Defensor del Pueblo de la Nación c. Estado Nacional y otra" (18/09/2007), Fallos: 330:4134.

<sup>83</sup> Case "Defensoría de Menores N° 3 c. Poder Ejecutivo Municipal" ("Colonia Valentina Norte Rural") (02/03/1999).

### *E. Privatizations and Companies' Responsibility to Protect the Right to Water*

Most cases concerning access to safe water and sanitation questioned the arbitrary omission of the state to act with due diligence to protect the right to water. In the case Matanza-Riachuelo, the Court urged the federal government, the province and the city authorities to submit an integrated plan comprising environmental planning, control over human activities, environmental impact assessment and environmental education programs.

Some cases also emphasized the concessionaires' responsibility to provide adequate drinking water and sanitation. In the nineties, water supply in the main Argentine cities, formerly provided by state-owned companies, was privatized.<sup>84</sup> During the economic emergency Argentina faced in 2001-2002, various water supply companies brought claims against the government's decision to freeze tariffs and expropriation, which resulted in several international arbitration procedures before the ICSID and the termination of concession contracts.<sup>85</sup> Argentina argued that its human rights obligations under the right to water should prevail over its obligations under the respective bilateral investment treaties. Notwithstanding, in most of the cases the arbitration awards condemned Argentina for non-compliance with core international investment standards, such in the cases Aguas del Aconquija, Impregilo S.p.A and Suez/Vivendi.<sup>86</sup>

Overall, private companies in charge of water supply are required to perform the duties set out not only in the concession contract, but also

<sup>84</sup> The type of contract used for public private partnerships was the concession.

<sup>85</sup> "Aguas Cordobesas SA (AC), Suez (Francia) y Sociedad General de Aguas de Barcelona SA (AGBAR) (España) c/República Argentina" (ARB/03/18); "Compañía de Aguas del Aconquija SA & Vivendi Universal c/República Argentina" (ARB/97/03); "Aguas Provinciales de Santa Fe SA (APSF), Suez (Francia), Sociedad General de Aguas de Barcelona SA (AGBAR) (España) e Interagua Servicios Integrales del Agua SA (Interagua) (España) c/República Argentina" (ARB/03/17); "Aguas Argentinas SA (AA), Suez (Francia), Vivendi Universal SA (Francia) y Sociedad General de Aguas de Barcelona SA (AGBAR) (España) c/República Argentina" (ARB/03/19); 7) "Anglian Water Limited (AWG) c/República Argentina; "EDF International S A (EDFI), Saur International SA y León Participaciones Argentinas SA c/ República Argentina" (ARB/03/23); "Urbaser SA y Consorcio de Aguas Bilbao Biskania, Bilbao Biskaia Ur Partzuergoa c/República Argentina" (ARB/07/26).

<sup>86</sup> ICSID Case No. ARB/07/17, June 21<sup>st</sup> 2011 and ICSID Case No. ARB/03/17, respectively.

in regulatory frameworks. In Quevedo, for instance, the judge established that the concessionaire had not complied with the obligation to provide 50 liters of water daily, ignoring the regulatory framework.<sup>87</sup> In other cases, private companies were held liable for water pollution which led to lack of access to drinking water. In the case Kaxipayiñ Paynemil, Mapuche communities filed an action against the company Repsol-YPF for the damages they suffered in their territory as a result of the extraction of hydrocarbons.

#### *F. Reparations for the Violation of the Right to Water*

In the Matanza-Riachuelo case, the Supreme Court stated that environmental protection is enforced through prevention and compensation measures, underlying differentiated environmental obligations that arise independently of the civil and criminal liabilities.<sup>88</sup> The Court decided to implement a comprehensive sanitation program, including specific restorative actions on the soil and water. The program's three simultaneous objectives encompassed: improving the quality of life of the basin's inhabitants, environmental reparation comprising all the basin's components (water, air and soil) and preventing future damages. The Supreme Court determined that the compliance monitoring plan should include public hearings before the Court.<sup>89</sup>

In the case of the Community Kaxipayiñ Paynemil, the Court ordered the provision of drinking water in quantities and quality necessary for the survival of the affected population; diagnosis and treatment of affected children; and adoption of appropriate measures to prevent future ground-water contamination.

#### *G. Access to International Protection to Guarantee the Human Right to Safe Water*

In the Communities Kaxipayiñ Paynemil case, the applicants brought a claim before the Inter- American Commission of Human Rights following

<sup>87</sup> Judgement Quevedo y otros.

<sup>88</sup> Judgement Mendoza, para. 7.

<sup>89</sup> It should be noted that the hearing be held on March 16, 2011 before the Supreme Court to evaluate the progress of the execution of the judgement, found the delay in the implementation of projects duly presented, underlying a growing concern regarding certain points of the program, including those relating to the provision of drinking water.

the partial compliance with the sentence.<sup>90</sup> Thus, after the exhaustion of the internal remedies, the affected communities sued Argentina for its failure to obey the court's order to establish measures ensuring water supply. Argentina, as a State responsible from the standpoint of international law, opted for a settlement before the Inter-American Commission of Human Rights and carried out the construction of a potable water plant and other health protection measures.<sup>91</sup>

## 2. *The Justiciability of the Right to Water before the Colombian Constitutional Court*

Although the right to water is not explicitly recognized under the provisions of the Colombian Constitution (1991), the Constitutional Court has upheld the right in various cases on the basis of a comprehensive and systematic interpretation. The implied (and justiciable) right to water derives from the broader "right to a healthy environment" enshrined in the Article 79 and the framework of social democracy and rule which guarantees fundamental rights, in particular the right to a decent life.<sup>92</sup> At the same time, according to Article 366 of the Constitution, water supply belongs to the category of public service to be provided by the state.

The Constitutional Court through the procedure of constitutional protection called "tutela" (or recurso de amparo as known in other Latin American countries) has given rise to a significant case law relating to the right to water. It can be said that the Court's position on the right to water is unanimous and peaceful without internal dissenting opinions.<sup>93</sup>

The criteria of interpretation of the content and scope of the right to water as protected by the Constitutional Court in Colombia have relied primarily on the jurisprudence of the Inter American Court of Human

<sup>90</sup> Judgement Comunidades Paynemil y Kaxipayiñ (Nº 12.010), available at: [http://www.es.cr-net.org/caselaw/caselaw\\_show.htm?doc\\_id=405939](http://www.es.cr-net.org/caselaw/caselaw_show.htm?doc_id=405939).

<sup>91</sup> See Falaschi O., C. and Osés, N., "CIDH: La causa Nº 12.010. Comunidades Mapuche Paynemil y Kaxipayiñ, Neuquén, Argentina".

<sup>92</sup> Constitution of Colombia, Article 79 and Preamble, available at: [http://confinder.richmond.edu/admin/docs/colombia\\_const2.pdf](http://confinder.richmond.edu/admin/docs/colombia_const2.pdf).

<sup>93</sup> There is a long list of cases in which the Constitutional Court has dealt with water rights in a period comprising since 1994 up to the present.

Rights and the General Comment No. 15 of the Committee on Economic, Social and Cultural Rights. In the interpretation made by the Colombian Constitutional Court, the observations and recommendations issued by the bodies authorized to interpret human rights treaties ratified by the country are relevant when clarifying the meaning of fundamental rights enshrined in the Constitution.

The right to water, from the perspective of the Colombian Constitutional Court, enjoys constitutional protection in different ways. Since decision T-760 (2008) there are minimum contents that make up the right to water, corresponding, as already stated, with the core obligations set out in General Comment Number 15. Therefore, the absence of any of the initial parameters for determining the quality and quantity of water minimum standards laid down, it must be concluded that the right to water was violated and the constitutional judge should take the necessary measures to stop the violation immediately. The second level refers to the aspects that go beyond the minimum content of the right, but that are part of the components of availability, accessibility, and quality defined in national regulations and in the General Comment No. 15. Its effectiveness depends mainly on the debate, decision and implementation of public policies. This cannot mean a perpetual postponement of the fulfilment of obligations, the constitutional judge must determine whether the infringement of the rights is due to the partial or total loss of investment or management<sup>94</sup> with proven negligence and must take the decisions and orders to ensure that such measures are adopted, while promoting citizen participation.<sup>95</sup>

Due to the complexity of the protection and conservation of water as well as its associated ecosystems, the activities involving the use of this resource are subject not only to the general principles embodied in the Constitution, but also to the principles which are part of environmental law such as solidarity, humility, “the polluter pays”, precaution and prevention, among others, which have been included in the Colombian Constitution of

<sup>94</sup> Decisions SU-1116/01 y T-207/95. Note that the Constitutional Court’s opinions generally are cited by number and year only, not by party names. The letter “T” before the opinion number signifies a tutela action and the letter “C” signifies an action of unconstitutionality. “SU” indicates a sentencia de unificación, a tutela decision by the full Court rather than a panel of three justices. Cases cited in this Article are available at: <http://www.corteconstitucional.gov.co>.

<sup>95</sup> Decision T-760/08.

1991. The principle of solidarity, requires understanding of the environmental liability regarding not only the present generations, but also the future generations, and not only in connection with the citizens of a State, but in a broader context.

One of the manifestations of this principle is the adoption of the sustainable development model in the Constitution (Article 80), according to which the demands of economic development need to be reconciled with the protection of the environment for present and future generations, which means that the present economic activities should "... remain within the limits of the capacity of the ecosystems that serve as a biological and material basis for production activities". The principle of humility, on the other hand, compels us to understand that human beings are dependent on nature so that nature can't be seen simply as a source of resources man-dominated, but as a complex system where man interacts with other actors and on which his livelihoods depend. In this context, both man and nature are valuable in the light of the Constitutional Charter.

A manifestation of this principle is the introduction of the concept of the ecological function of property (Article 58). According to this principle, "the polluter pays", those persons responsible for environmental pollution should bear the costs for the necessary measures to prevent it – where possible, mitigate and reduce it. This principle is intended not only to reduce pollution, but also promote the design of environmentally-friendly technologies that reduce the environmental impact of the industrial activities.

The adoption of the Precautionary Principle implies understanding that the technological development entails risks and uncertainties about its effects. Thus, according to the Principle 15 of the Rio Declaration, "... Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation". This principle has been incorporated in numeral 6 of article 1 of Law 99 of 1993, which also requires effective measures to be taken so that environmental degradation can be avoided.

The adoption of these principles and duties, and the recognition that the right to water is a fundamental human right, but at the same time a finite resource, has involved a change in the understanding of the justice principles to decide cases of environmental controversies.

The following selected cases are illustrative and account for the state of the art of the protection of the right to water in the case law of the Colombian Constitutional Court.

**A. Access to Water as a Fundamental Right**

The access to water represented an early concern for the Constitutional Court from the beginning of its work in 1991. Consequently, the first ruling of the Constitutional Court on the right to water and sanitation was the Decision 406 of 1992. It dealt with a case in which a public service company had stopped halfway repairing a sewer; as a consequence, the applicant did not have water supply at home, putting his health and personal integrity at stake.<sup>96</sup> On this occasion, the Constitutional Court decided that the Public Service Company had committed “a clear violation of a fundamental right”, as the uncompleted sewer had caused the overflow of sewage on the streets of the neighborhood, affecting low-income people.<sup>97</sup> Since then the Court established, specifically, that the right to water supply could be protected “in those cases clearly affecting rights and fundamental constitutional principles such as those relating to the human dignity, life and rights of disable people”.<sup>98</sup> Similarly, in the Case T-481, 1997, the Court decided in application of the *pro infans* principle that the right to water of children should be especially protected, taking into account, among other reasons, because of the negative impact it had on their education.<sup>99</sup>

**B. The Right to Have Access to Water Supply with Regularity and Continuity. Intermittent and Sporadic Water Supply**

In the Case T-539 (1993) the Constitutional Court decided to protect the right of a group of neighbours who had paid for an irregular and inadequate water supply, since the conditions of the service had worsened. On this occasion, the Court determined that there was “a real threat to the peti-

<sup>96</sup> T-406-1992 (MP Ciro Angarita Barón, AV José Gregorio Hernández Galindo).

<sup>97</sup> *Idem*.

<sup>98</sup> *Idem*.

<sup>99</sup> The case dealt with the right of two groups of children attending schools lacking adequate access to water quality. Decision T-481-1997 (MP Fabio Morón Díaz).



tioner's fundamental rights" because "the lack of safe drinking water for daily consumption (...) due to the negligent and careless service delivered by the responsible company".<sup>100</sup> In a similar vein, the Court has protected the right of people to water, when it is severely affected, because of other uses, e.g. agricultural. In the Case T-232 of 1993, the Court found that it was necessary to safeguard the right to water and life, because of a demonstrated depletion of a water source due, among other reasons, to a different use rather than human consumption.<sup>101</sup>

### C. *Access to Water and Vulnerable Groups*

In the Case T-091 (2010) the Constitutional Court held that a severe, prolonged and constant interruption of water supply violated the right to water in particular of those individuals subject to special constitutional protection.<sup>102</sup> The Court ordered the water company to "optimize the provision of drinking water" and perform the studies and the works leading to the continuity of water supply. In different cases in which the water supply was intermittent and sporadic, the Court, emphasized that this situation poses a serious risk to health, physical integrity and life of the subjects worthy of special protection such as ill people, pregnant women and children. Also, in the case of prisons, the Court has stated that the restriction of the right to liberty in pursuance of a judgement may not involve a disproportionate restriction of other fundamental rights like the right to water. In applying this rule, the Court ordered the necessary repairs to the pipes of a prison that due to a damage in an aqueduct supplied water for showers and toilets only a few minutes during the day.<sup>103</sup> Finally, in a case in which the action of public bodies conducting work prevented the domestic consumption by a community, the Court demanded the provision of water in tank cars and ordered the creation of a technical committee to take final decisions to ensure availability.<sup>104</sup>

<sup>100</sup> *Idem.*

<sup>101</sup> Constitutional Court, decision T-232/1993 (Alejandro Martínez Caballero).

<sup>102</sup> T-091-2010.

<sup>103</sup> T-1134/04, on the situation of prisons see Case T-153/98.

<sup>104</sup> T-381/09.

#### *D. Non-Discrimination in the Distribution of Water*

The Decision T-294 (1994) stated that the sources of water should be used in way that no individual can access an amount of water which decreases the quantity received by other beneficiaries, up to the point that they do not have enough liquid for personal use of the same source. In this case, some individuals built a reservoir which received a higher percentage of water as that approved by the authorities. This generated a significant reduction of water available to the rest of the community. Although there was an administrative act ordering to destroy the dam, its owners refused to comply with it. Therefore, the Court ordered the construction of an aqueduct that would allow equitable access to drinking water.

#### *E. Availability of Water Supply: Right to Water, Emergency Conditions and the Right to Health*

The interdependence of the right to health and the right to water is beyond dispute. The Colombian Constitutional Court has indicated that it is not possible to suspend the water supply to a person who is behind on payments, when he needs health care to preserve his life and personal integrity and does not have the financial resources to pay for the public service. For example, in Case T-270 (2007) the Court protected the rights to health, life and dignity of a woman who had suffered water and electricity cut offs for non-payment, because she needed to treat the diseases she suffered. The Court ordered an end to the suspension even in the case of non-payment.

Another recent case before the Colombian Court regards also the inability to suspend the provision of water service. The Court stated that is not possible to cut off the water supply if the lack of payment obligation was unintentional or due to an insurmountable force and, in addition, it affects people who deserve special constitutional protection and the service is essential to ensure other fundamental rights such as life, equality, dignity and health.<sup>105</sup>

Similarly, in the Case T-143 (2010) the Court determined that there was a breach of the obligation of availability, because the city had not taken the necessary actions to guarantee the access to water after an earthquake

<sup>105</sup> Decision T-546-2009 (MP María Victoria Calle Correa).

that destroyed the well and burned the “pump” that supplied water to indigenous people inhabiting. In this case, the mayor of the area ordered to provide the affected indigenous peoples, the quantities of water sufficient to meet their daily consumption needs. According to the judgement, the supply should be provided to both peoples until they achieve a permanent solution to their supply problems.

#### *F. Inadequate Sewer Systems and Human Right to Water*

The protection is emphasized in cases where people dump waste on water sources, limiting access. In cases like T-523 (1994) the Court protected the rights to life, health and the to a healthy environment for people who were supplied polluted water by waste that was poured by one neighbour into the water.<sup>106</sup> In Case T-207 (1995) the Court reiterated that the stagnation of sewage can cause malaria, typhoid fever and skin diseases; ordering to carry out the necessary work to fix the sewer.<sup>107</sup> A couple of years later the Court emphasized this same position in the sentence SU-442 (1997) after finding contamination in several bays in the north due to the discharge of waste-water from the sewer system of the city, and for the treatment of solid wastes, which considered a particularly irregular that threatened the health, life and the environment of residents and tourists.<sup>108</sup> In the Case T-410, 2003, the Court decided to protect the fundamental rights of persons belonging to a community that consumed water unfit for human consumption, provided by a public aqueduct. The Court held that “drinking water is a fundamental constitutional right, when intended for human consumption it is essential to life”.<sup>109</sup>

#### *G. Appropriate Water Conditions*

The Court has also protected the right to receive water in acceptable physical and chemical conditions. For the Court “the water found polluted and unfit for human consumption by the authorities is a risk factor and a viola-

<sup>106</sup> Decision T-523-1994 (MP Alejandro Martínez Caballero).

<sup>107</sup> *Idem*.

<sup>108</sup> Decision SU-442-1997 (MP Hernando Herrera Vergara).

<sup>109</sup> Decision T-410-2003 (MP Jaime Córdoba Triviño).

tion of fundamental rights to life, human dignity, health and a healthy environment” of a community.<sup>110</sup> For this reason, the Court has required the authorities to advance technical studies, or to take on a peremptory basis the necessary measures to ensure drinking water supply in municipalities, villages and neighbourhoods.<sup>111</sup> It was also argued that this situation violates the right to water when the suppliers do not guarantee a person or a community access to a necessary and appropriate water service, or impose a disproportionate cost regarding the socio-economic status of people. For these reasons, the Court ordered the company in question to provide water supply, allowing the collection and the installation by the users except when due to technical studies, plans and licenses it can only be carried out by the company.<sup>112</sup>

Finally, it is important to indicate that though the mentioned previously can be understood as the minimal content of the fundamental right to the water, also there are other types of state obligations, which demand actions as appropriation of budget, legislative processes, planning economic and, political strategies in order to fix goals and to join efforts to achieve the major possible coverage of the right to the water opposite to the population in Colombia.

## V. CONCLUDING REMARKS

In a context of scarcity and difficult access to water, with the possible negative impact of climate change, the recognition of the right to water constitutes the first step in order to give adequate and effective protection. Even if there is no specific and binding international human rights instrument enshrining the right to water, there is an indirect recognition under various international and regional human rights treaties.

Since there are scarce or deficient mechanisms to enforce the right in the international context, the justiciability relies on national institutions. The enforceability depends on the ability of the courts to guarantee the

<sup>110</sup> T-410/03.

<sup>111</sup> See decisions T-381/09, T-888/08, T-410/03, T-092/95, y T-539/93.

<sup>112</sup> T-1104/05.

right. As seen above, there are different approaches to the right to water in the national constitutions, with explicit or implicit recognition. National courts have created and set forth a process for to the protection of the right to water. The cases settled provide the international community with examples of how the right to water can be effectively implemented.

In Argentina, national courts have upheld the right to water as implicitly enshrined in the right to environmental protection. In the case law both state and private companies have been held responsible for guaranteeing an appropriate water supply, especially for those individuals who find themselves in difficult situations.

In Colombia, the Constitutional Court has protected the right to water to everyone, removing the obstacles which may hinder the enjoyment of the right, in particular, in the case of vulnerable people in need of constitutional protection.

This judicial activism does not represent a straightforward solution for the lack of access to water, but provides with useful insights for protecting the right. Though this is early days; the progress made to guarantee the right to water demonstrates the further possibility for it to be consolidated in the future from a transnational law perspective.

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