

# THE HUMAN RIGHT TO A HEALTHY ENVIRONMENT, PUBLIC PARTICIPATION AND *IUS COMMUNE*<sup>1</sup>

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## ABSTRACT

The human right to a healthy environment or the human right to a safe, clean, healthy and sustainable environment is linked to the right to access to environmental participation. Public participation is a mean to exercise the human right to a healthy environment, as well as part of its normative content. The Inter-American Court of Human Rights case law has developed environmental participation criteria. Thus, the Court has built up minimum standards which make part of an *ius commune* on human rights in Latin America. This paper seeks to define the role and relevance of the norms of public participation in the environmental protection. Thus the guiding question is: which role does public participation play in environmental protection and what are the legal sources? Dogmatic analysis is the method used in this paper. The full enjoyment of environmental consultation, participation and consent rights, are requirements for the fulfillment of a real, participative and deliberative democracy. International human rights law has developed participatory minimum standards that are supposed to be shared amongst States.

**Keywords:** human right to a healthy environment; Inter-American Court of Human Rights; *ius commune*; public participation; right to environmental participation.

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*EL DERECHO HUMANO A UN MEDIO AMBIENTE SANO, LA PARTICIPACIÓN PÚBLICA Y EL IUS COMMUNE*

*RESUMEN*

*El derecho humano a disfrutar de un medio ambiente sano, o bien, sin riesgos, limpio, saludable y sostenible se encuentra vinculado con el derecho de acceso a la participación ambiental. La participación pública es un medio para alcanzar el derecho a un medio ambiente sano, pero también forma parte de su contenido. La jurisprudencia de la Corte Interamericana de Derechos Humanos ha desarrollado el derecho a la participación ambiental. De este modo, la Corte ha contribuido a establecer estándares mínimos que forman parte del ius commune de derechos humanos en América Latina. El objetivo principal de este trabajo es determinar la relevancia y el rol que juega la participación pública en la protección ambiental, así como las normas que lo apuntalan. En este contexto, la pregunta que orientaría el estudio sería ¿cuál es el rol que juega la participación pública en la protección ambiental y cuáles son las fuentes de la misma? El método utilizado será el del análisis dogmático y normativo, junto con la técnica de revisión documental. Encontramos que la satisfacción plena de los derechos de consulta, participación y consentimiento en el ámbito ambiental, son supuestos necesarios para la realización de una democracia real, participativa y deliberativa. Desde el derecho internacional de los derechos humanos comienzan a desarrollarse estándares participatorios ambientales mínimos que se proyectan como comunes para los Estados.*

**Palabras clave:** *derecho a un medio ambiente sano; derecho a la participación ambiental; participación pública; Corte Interamericana de Derechos Humanos; ius commune.*

## FOREWORD

The human right to enjoy a safe, clean, healthy and sustainable environment has developed strongly at the level of the UN, especially thanks to the work of the United Nations Special Rapporteur on the environment and human rights, John Knox. Based on the work done by the Special Rapporteur, with the help of the member states of the Organization, the content, contours and limits of the human right to the environment were defined and implemented.

Moreover, at the international level, international case law has played a relevant role in recent times. To quote one example among many, the Inter-American Court of Human Rights (IACHR Court) issued an Advisory Opinion on the environment that contains important principles and definitions on environmental protection and the right to live in a safe, clean, healthy and sustainable environment. Undoubtedly, all of these definitions and principles contribute to filling the international *corpus iuris* of human rights related to the environment, and those in which human rights are included as part of the environment. This important evolution taking place in the field of international law could have a decisive impact on the future development of human rights constitutional law within States. This is particularly relevant, given the IACHR Court's Advisory Opinion in the member states of the Inter-American human rights protection system.

One of the most precisely defined characteristics in the current evolution of the right to a safe, clean, healthy and sustainable environment has been the ever-closer interdependence between so-called substantive environmental rights and procedural environmental rights, such as the right to environmental participation.

The main objective of this paper is to determine the relevance and role of public participation in environmental protection, as well as the norms that support it. In this context, the question that will guide the study will be: What is the role of public participation in environmental protection and what are its sources? The method used will be the dogmatic and normative analysis, together with the document review technique.

In this article, we will first address the connection between environmental protection and public participation, and then the relationship between the human right to a healthy environment and the *ius commune*.

## 1 ENVIRONMENT AND PUBLIC PARTICIPATION

At the heart of the notion of environmental democracy is, of course, the right to participation, an essential element of the right to democracy. In addition, this last statement is made, even though generally environmental participation is only addressed from the perspective of procedural rights in the environmental context (WAITE, 2008). Sometimes, a distinction is even made between political participation and administrative participation, trying to separate them (JORDANO, 1995). Perhaps an alternative to this view is the rights approach, in the sense that all human rights are interdependent and interrelated. Therefore, the right to information, the right to participation and access to environmental justice are all human rights whose compliance with, protection, and satisfaction are necessary for the full realization of the right to a healthy environment. Moreover, Sarlet and Almagro (2013, p. 383) state that “fundamental rights are material projection into the constitutional state of the democratic principle”.

Different legitimate titles that would justify environmental participation could be used. Thus, from the Spanish point of view and considering the legitimacy of the environmental interest (the individual as self-interest holder – *uti singulus* – or interest holder as a member of the community – *uti cives*), it was stated that

[...] when a citizen participates in a procedure (in a broad sense) using their right to an appropriate environment, they are at the same time taking an individual legal standing (right to environment pursuant Article 45 EC as a subjective public right) and a collective legal standing. That is because a collective right or interest encompasses both its owner and the community. This qualification is not merely terminological, since the important consequence derived from it is the strengthening of the standing from which one participates and the very content of that participation. This will entail not only the possibility of using data unknown to the Government or of being heard in order to shape the sovereign, bureaucratic and discretionary administrative decision, but also – and this is the main thing – the possibility of controlling it based on substantive parameters and not merely on reactionary restrictions (JORDANO, 1995, p. 196).

The participation of individuals in a community, understood as the permanent exercise of the right to a democratic government, is consubstantial to democracy; it is what explains it, maintains it, and is its continued objective (FRANCK, 1992, p. 46; JACKSON, 2002, p. 304; see FOX; ROTH, 2000). It is a little closer to this global notion of the right to participation, as pointed out by Costa and Fuentes (2011, p. 86), when

they see “citizen participation” as “voluntary activities through which members of civil society can fundamentally intervene in three areas: the election of their rulers (directly or indirectly), in public management, and in the exercise of citizen control”. This aspect of control is essential in explaining the relevance of environmental public participation (which some consider to be functional participation), since “the scope, quality and content of relations between society and its environment will largely depend on empowerment and exercise of the means offered by functional participation as a mechanism of control and influence in the application of law” (JORDANO 1995, p. 200). Sarlet and Almagro (2013, p. 386), on the other hand, define the political participation of citizens according to a tripod:

- a) directly (mainly through the legal constructs of referendum, plebiscite, and popular legislative initiative);
- b) indirectly, through the election of the representatives who will comply with the will of the representative bodies of the State;
- c) by direct incorporation of the citizen into state powers or the civil service.

Public participation has the advantage of imparting transparency, fairness and legitimacy to the decision-making process, allowing for the strengthening of ties within the community precisely because it finds its justification in the very exercise of the right to democratic participation, of government by their own consent, and of the principle of popular sovereignty. The latter acquires a particular scope due to the growing interest on environmental protection and preservation among society. Thus, Costa and Fuentes emphasize that one of the advantages of public participation in decision-making on environmental issues is that it allows for the

incorporation of knowledge into the assessment process of local community proposals; thus improving projects. Moreover, relations, dialogue, exchange and co-operation between the community, the proponent and public services are fostered; citizenship capacities are strengthened; information delivery is expanded and channeled according to the characteristics of each community; and the decision-making process takes on transparency and legitimacy, establishing harmonious relations with the community (COSTA; FUENTES, 2011, p. 89; MIROSEVIC, 2011, p. 285).

## 1.1 Concept

Environmental participation is an increasingly relevant kind of specific exercise of the human right to participate in environmental issues, which is a public function by constitutional and international definition. Behind this right is the notion of government by the consent of the people.

Environmental participation undoubtedly finds its legal sources in the deepest pillars of constitutional and international law.

## 1.2 Sources

The right to public participation is a fundamental principle in a constitutional and democratic rule of law. The principle of the rule of law and human rights operate in the 21st century constitutional state. The right to public participation, especially in the environmental field, is recognized in international law and constitutional law.

### 1.2.1 International sources

The Declaration of the United Nations Conference on the Human Environment, held in Stockholm in 1972, recognizes in its Principle 1 that:

Man has a fundamental right to freedom, equality and to enjoy adequate living conditions in a quality environment that enables him to lead a dignified life and enjoy well-being, having a solemn obligation to protect and improve the environment for present and future generations.

The same Stockholm Declaration states in its Recommendation 97 that the United Nations Secretary-General should

[...] Establish an information program designed to arouse individuals' interest in the human environment and gain public participation for its management and control. This program will draw on traditional and contemporary public media, taking into account national peculiarities. In addition, it should provide the means to stimulate the active participation of citizens, arouse their interest, and obtain the contribution of non-governmental organizations in protecting and improving the environment.

Moreover, the elementary principle of environmental participation is grounded in international law, *inter alia*, in the 1982 World Charter for Nature. In fact, Principle 23 of that instrument states that:

[...] All persons, in accordance with their national legislation, shall have the opportunity to participate, individually or with others, in the formulation of decisions of direct concern to their environment, and shall have access to means of redress when their environment has suffered damage or degradation.<sup>3</sup>

Similarly, Principle 10 of the 1992 Rio Declaration states that

Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

From a European point of view, the aforementioned Principle 10 has been incorporated into the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, adopted at Aarhus in 1998 (AARHUS CONVENTION)<sup>4</sup>. In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention (AARHUS CONVENTION, Art. 1)

### *1.2.2 Constitutional sources*

Article 1, paragraph 4 of the Political Constitution of the Republic of Chile states that it is the duty of the State to “[...] promote the harmonious integration of all sectors of the nation and guarantee the right of the people to participate in national life with equal opportunity”.

This same constitutional consecration of the right to participation is found in comparative law. For example, from this latter point of view, in Mexico, Brañes (2000, p. 165) argued that “social participation in environmental management finds its legal basis in various constitutional articles, such as 4, 25, 9, 40 and 41”. Vera, Lina and Conraud (2009,

<sup>3</sup> The World Nature Charter was approved by the United Nations General Assembly via Resolution 37/7 of October 28, 1982.

<sup>4</sup> The Convention was adopted at the “Environment for Europe” Ministerial Conference, held in Aarhus, Denmark, on 25 June 1998.

p. 193) added that “these latter two state that the people exercise their sovereignty through the Powers of the Federal Government, in the cases under its jurisdiction, and by the States, in relation to their internal regimes, according to what is established by the Constitution itself and by the states”.

### 1.3 Social participation

Social participation is essential in decision-making processes regarding environmental issues. Social participation implies the direct engagement of the affected community in the decision-making process and the final adoption of the decision itself. As Bishop (1981, p. 88) pointed out over 30 years ago, “As a general rule, everyone should have the opportunity to participate. The public may choose whether to participate or not. It is their prerogative. But the State (sic) must ensure that choice is always available to the public” (BISHOP, 1981, p. 87). However, Echavarren (2007, p. 110) stresses that “[one] way of obtaining information and cooperation from the local community is through social participation, an inherent part of an environmental impact assessment”. But the proposed social participation in environmental decision-making goes beyond mere dissemination or social communication; it is rather the ability to research on and provide environmental information. Bishop, for example, tends to identify participation with social communication. Thus, this author stated that, “when public participation becomes essentially a process of social communication, without identifying the public involved in that process, it cannot operate effectively” (BISHOP, 1981, p. 87)<sup>5</sup>. In this regard, Echavarren mentions four possible models of communication with the group or community affected by the environmental impact of the project.

There are four models of communication processes: (1) the *diffusion model*, which focuses on the phases of information distribution; (2) the *collection model*, which includes feedback processes, problem identification and assessment, and others; (3) the *interaction model*, which includes mechanisms for achieving social consensus; and (4) the *disclosure-collection model*, in which the conclusions of the assessment report are publicly disclosed (ECHAVARREN, 2007, p. 110).

By the way, it is very relevant to identify the affected community, which may be local, regional, state or even international. But in our view, social participation ultimately implies – either by consensus, acceptance or consent – a control over the environmental decision.

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<sup>5</sup> “This advice is of prime importance. Since public participation is essentially a social communication process, without the identification of the publics involved in this process it cannot operate effectively”.

Community participation in the decision-making process is only a reflection of the degree of democratization of a society. For his part, Bishop (1981, p. 93) stated that social participation serves five purposes:

- Promote information, education and coordination;
- Identify potential problems, needs and values;
- Enable the flow of new ideas and problem solving;
- Enable more democratic participation by affected communities and the assessment of alternative development projects that affect them;
- Assist in building social consensus and conflict resolution.

When the decision concerns environmental issues, participation can be specified as environmental and democratic within that community – whatever its organizational level – as well as environmental.

Social participation is, therefore, a *sine qua non* condition of environmental decision-making, for without it, that decision-making process lacks validity. Thus, Echavarren (2007, p. 110) argued that

[...] Social participation is not, therefore, a socioeconomic factor of the Environmental Impact Assessment, but a requirement for it, which indicates the depth of the analysis of the social impact caused, and provides a sample of the democratization level of the society that carried it out. Social participation is a constant feature of the Environmental Impact Assessment in the legislation of all countries where it is applied, with greater or lesser importance. The minimum expression of public participation in Environmental Impact Assessments, which is common practice in many of them, is to provide information on the development of the project in question, prior to its implementation, and to receive claims in this regard.

In this sense, Irigalba, Etxaleku and Echavarren (2002, p. 361) stated that “public participation fulfills several objectives. One of the most important of which is information”. In addition, linked to the above, they added that “the fact that the community is aware that it has some power over public decisions has its social importance.” Indeed, social participation is a requirement that gives legitimacy to the decision-making process and the decision itself, and thus strengthens the bonds of trust between the different players in a society. Therefore, participation is an essential factor for legitimating the exercise of power, and environmental participation relates to environmental decision-making. The social legitimacy of the environmental decision will lead to its broad social acceptance. When social participation in environmental issues is understood this way, this can only result in the strengthening of social cohesion.

### *1.3.1 The importance of taking into account the social assessment of the project*

It can be seen that social participation allows the fundamental consideration of the will of the community affected by the environmental impact of a project to be taken into account. This participation has the virtue of being an actual means of exercising democracy and envelops both the process and the final decision with an aura of not only legal, but above all democratic legitimacy. This legitimacy is one of the reasons that justify taking into account the social assessment of the project. From this point of view, Echavarren proposes that an environmental impact assessment of socioeconomic aspects should include at least the study and analysis of the following factors: First, the quality of life of the population, which may include aspects such as lifestyles, social identity, tourism, health, social values, etc. In this sense, in a fundamental examination of Article 45 of the Spanish Constitution, Jordano (1995, p. 106) clearly distinguished two closely related concepts, namely: quality of life and environment, indicating that the environment, its protection, restoration and improvement are understood as indispensable elements of the concept of quality of life, but not the only ones. Second, the demographics. Third, the economy and the working population, which could include aspects such as infrastructure or land use. Fourth, cultural factors, which may include aspects such as archaeological sites, historical sites, architectural elements, natural heritage, etc. Fifth, the landscape; and sixth, the relations of the social community with its biophysical environment (ECHAVARREN, 2007, p. 103). Echavarren adds that the consideration of each of these factors and the weight attributed to them in each study will vary according to each situation, as the environmental impact assessment is an instrument that should be characterized by its flexibility and, therefore, must adapt as best as possible to each particular case (ECHAVARREN, 2007, p. 103). This is why Pardo (1994, p. 164) argued that

[...] it would also be important to shift from the rigid approach to public participation – the fundamental basis of which is public posting of the document at the premises of the city hall and similar places for a more open access to it – through more participatory, dynamic and interactive ways, in order to incorporate social assessment of projects and their negotiations.

From the time public participation is an expression of democracy and an actual manifestation of the exercise of sovereignty as the sole

and exclusive power of the people, public participation in environmental processes, as has been pointed out, must become flexible, dynamic and open in order to admit the different possibilities of including the participation of all those involved. The latter would be in line with Häberle's (2010, p. 381) proposal for a citizen democracy. From this point of view, this notion of public participation coincides with the notion of democratic society in an open constitutionalism system<sup>6</sup>. Likewise, this participation is embedded in a dynamic constitutionalism, subject to the cultural diversity of society (WARLEIGH, 2006, p. 68; MÜLLER; SCHEPPELE, 2008, p. 67; HABERMAS, 1996; 2001, p. 5).

### *1.3.2 Dialogue, negotiation, and social acceptance of the project*

Public participation in environmental decision-making processes not only has a democratic justification, as mentioned above, but is also clearly legal in the sense of respecting the right to self-determination enshrined in both Article 1 of the International Covenant on Civil and Political Rights and in the International Covenant on Economic, Social and Cultural Rights. In this sense, public participation becomes the measure of a democratic society in the 21st century, so that the greater the quantity and quality of individuals, communities, and peoples, the better the democracy of that society. Thus, public participation also becomes a source of social harmony and consensus, in the sense that direct or indirect participation in decision-making produces the consequent social acceptance of the effects or impacts that produce the environmental decisions made.

In connection with social participation in environmental issues, Dron refers to the choice of acceptable risks or the acceptable state of the environment, and stresses that this choice, in a democratic society, must be made with as general a consensus as possible. Along this line of social acceptance of the (risky) environmental decision, Dron (2000), quoting Sagoff, resorts to saying that: there is a moral difference between "jumping and being pushed". The largest possible call for contributions implies a transformation of the traditional way of exercising power and decision making. The knowledge, wisdom and opinions admitted and even indispensable for environmental decision-making involve taking other players into account besides those who traditionally have access

<sup>6</sup> "Habermas affords civil society an important role in opinion-formation within the public sphere, mediating between the 'lifeworld' and the political 'system'" (ARMSTRONG, 2006, p. 47).

to decision-makers. What was explained above means questioning and challenging classical decision-making processes (DRON, 2000).

Still in the context of reaching the necessary consensus, or the largest agreement in the environmental area – which implies having the largest possible call for contributions – Dron (2000, p. 110) refers to social negotiation on environmental issues and points out that it is not symmetrical and causes specific procedural complexities (OST, 1995).

Pardo (1994, p. 164) also argues that environmental impact assessment should, above all, consider “the social acceptance of the project, so that there is public participation from the most incipient phases of the project”. Public participation allows or facilitates, among other things, community acceptance of environmental impacts. Thus, Gonzalez (2006, p. 124) argued that participation has “the goal of achieving social acceptance of the impacts produced by a new development, and the understanding, change of opinion and transformation of attitudes and practices”.

So, public participation in the proposal, planning, analysis and decision-making processes of projects with environmental impacts not only increases the democratic legitimacy of the environmental decision, but also has the potential to avoid social and environmental conflicts. An environmental process open to the widest possible participation, transparent and respectful of the will of the affected community would undoubtedly generate trust in the people ruled. In this sense, Echavarren (2007, p. 111) argues that

[...] in the process of social participation, the trust and credibility of the research team is essential; that will be achieved by providing all groups and subgroups with similar opportunities for collaborating in the process and, in the same way, it is necessary for subsequent drafting of the conclusions to have as objective a shape (or appearance) as possible.

Thus, furthermore, the constitutional principle of trust and fulfillment of legitimate expectations would be met (BERGE; WIDDERSHOVEN, 1998; BEVIER, 1980; QUINOT, 2004). In this sense, it was argued that “one of the fundamental principles of the Constitution is for a State to be governed by the Rule of Law (*Rechtsstaat*). The primary principle of a State governed by the Rule of Law (*Rechtsstaat*) is the protection of the rights of the people, the maintenance of legal order and adherence to the principles of honesty and goodwill. The legitimate trust of the people in the results of the exercise of power by the authorities must be adequately protected by law; this is the rationale of the principle of legitimate expectations

(*Vertrauensschutzprinzip*)” (CONSTITUTIONAL COURT OF TAIWAN, 2001, Case n. 525).

#### **1.4 Environmental participation, complexification of the system, and the process for its further democratization**

There are various levels of participation, thus establishing the right to participate in the management of public affairs, such as a range of rights or a multifaceted and multidimensional right. Indeed, public participation can take on different aspects, ranging from simple access to information to decision-making by the affected community. However, it should be noted that, from the material point of view and from the perspective of the democratic exercise of sovereignty, it is the affected people or community that ultimately makes the final decision about their destiny.

However, from a procedural point of view, the actual implementation of the right to participate may acquire varying degrees or be subject to gradual implementation. In this context, the right to consultation and free, prior and informed consent appear as actual forms of public participation. What is the relationship between participation, consultation and consent? Their relationship is simply one of intensity or degrees of participation, but all are specific aspects or dimensions of the human right to participation, which in turn is a manifestation of the right to self-determination. What is preached about democratic participation in general is fully applicable to environmental participation.

Also, even from the point of view of participation in environmental decisions, it is where it was created with greater force than matters, for low degrees of participation, such as consultations, are not enough. It has been proposed that, in the environmental field, it is necessary, with special urgency and need – supported by the community itself – to move towards more intense degrees of participation, where not only the opinion of the community or people is sought, but – to impart seriousness to the democratic exercise of this right – the consent of the people affected must be obtained. That is why it was argued that “it does not seem serious that what is being done is called public participation” (PARDO, 1994, p. 164).

Thus, it was also stated that public consultation in the processes of environmental impact assessment is obviously a kind of social participation VERA MORALES; LINA MANJARREZ; CONRAUD, 2009). In its turn, social participation can be said to be a kind of public participation.

Thus, Costa and Fuentes suggest that there are different levels of environmental participation, depending on the degree of influence of the players in environmental decision-making process, i.e. the informational or unidirectional level, the advisory or bidirectional level and, finally, the resolutive or binding level. Indeed,

[...] first, there is the *informational* level, at which one of the parties, the proposer or the authorities, provide information about the project and its impacts. Examples include newsletters, leaflets and radio announcements. At this level, *information* is delivered unidirectionally, with no immediate possibility of resolving questions or specifying other aspects. Secondly, we consider the *consultative* level of Citizen Participation, where stakeholders are part of a process during which they can make recommendations and observations, and clarify doubts, without it being required in the decision-making. At this level, a two-way informational relationship is established between the players. Finally, the *resolutive* level, which implies that the parties involved have the same degree of impact on the decision-making. At this level, participants give a binding opinion that must be enforced by the authority (COSTA; FUENTES, 2011, p. 88).

On the other hand, Pardo (1994) proposes three levels of social participation in the different phases of project environmental assessment in the environmental impact assessment process. First, an increase in participation at the feasibility level; second, an increase in participation at the level of the study to find alternatives or of the whole project; and finally, he proposes the project development level (PARDO, 1994). At each of these three levels of participation, Pardo (1994) suggests three phases or stages of participation, namely, prior consultation, study of social acceptance and, finally, public participation as such. We dare to suggest a fourth step that would be inserted after prior or preliminary consultations and before social acceptance, referring to a study of non-violation of the human rights of both individuals and groups or communities, which would certainly increase the chances of overcoming the next stage relating to social acceptance. In short, based on Pardo, we propose a four-step participation in the now complex process of environmental impact assessment: first, prior consultations; second, study of non-violation of human rights; third, study of social acceptance; and fourth, public participation as such. As noted by Pardo (1994, p. 164) “Such approach complicates the process, of course, but democratizes it and ultimately makes it more effective in terms of the real possibility of impact detection, as previously indicated, and also the social legitimacy of development projects.” For the same reason, Echavarren (2007, p. 105) highlights that “defining the scope of study of socioeconomic factors is a complex task”.

## 2 HUMAN RIGHT TO A HEALTHY ENVIRONMENT AND *IUS COMMUNE*

In this part, we will address the examination of human rights norms as the new common law, especially highlighted in Inter-American law and the constitutional nature of the role of judicial protection of human rights, in order to justify the notion that every court that protects human rights plays a constitutional role.

### 2.1 Human rights and common law

Human rights are the basis of a new *ius commune*. In this sense, Serna de la Garza (2013), when faced with the question “What is *ius commune*?” provided the following answer:

First, we can say that the countries of the Inter-American human rights system share in their Constitutions a series of common values centered on the dignity of the human individual and the rights that radiate from it. Secondly, there is a common normative corpus for States linked to the Inter-American system of human rights protection: the American Convention on Human Rights and the case law of the Inter-American Court of Human Rights (SERNA DE LA GARZA, 2013, p. 36).

The great jurist Jorge Carpizo clearly defined this notion of *ius constitutionale commune latinoamericanum*, pointing out the following:

The American Convention and its final appeal interpretation, carried out by the Inter-American Court of Human Rights (IACHR Court), are creating a Latin American human rights *ius commune*, which implies that any inhabitant of the region enjoys a minimum set of rights that each country’s constitution may expand, but never restrict, because of the international obligations that each State has contracted by ratifying the American Convention itself and by accepting the binding jurisdiction of the IACHR Court (BOGDANDY, 2013, p. 43).

This *ius commune* would be built on the notion of common minimum standards shared by states that are parties to the Inter-American human rights protection system. These common and shared standards would be determined by positive laws, for example the 1969 American Convention on Human Rights and the interpretation given by the body authorized to do so (INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, 2011, p. 2). The body authorized to interpret the American Convention on Human Rights is the Inter-American Court of Human Rights.

Why are human rights a breeding ground for the development of an

*ius commune* in Latin America? There are at least four elements that would eventually allow the emergence of a human rights *ius commune*.

1. A common language: the legacy of Iberian colonization in America left us by the Spanish or Portuguese. This linguistic community, which does not exist in Europe, greatly facilitates not only communications, but, above all, allows for the existence of a community of thoughts, ideas and even a union around the linguistic expression of values.
2. A common cultural base: in general terms, Latin America has the same ethnic origin, partly indigenous and partly resulting from waves of colonization, mainly from the Iberian Peninsula. Latin America is the result of the same colonization process that began since the time of Christopher Columbus. This fact created an indelible mark on the region that affects its current populations. The Catholic religion that spread alongside remnants of indigenous beliefs was also fundamental to this process of Latin American cultural development. Although indigenous peoples have bordered on extinction in America, their resilience has enabled them to survive by fundamentally mixing with immigrant and slave populations, and in parts, without mixing with other populations. The latter is a fundamental fact in Latin America, as the indigenous worldview is infused in the lifeblood of the region and, therefore, the community vision is strongly ingrained here, as in Africa.
3. A common idiosyncrasy: the distinctive features and characteristics of the American community justify the presence of a common vision regarding the position held by the individual and the community. At this point, the situation in Latin America is similar to that in Africa, where the community aspect occupies a relevant place in human relations.
4. The high rate of inequality and iniquity in Latin American societies: in fact,

[...] Latin America is still made up of developing countries, with large social sectors located below the poverty line, high levels of income concentration and the highest level of inequality in the world. However, it is notorious that, despite existing difficulties, for the first time a developing region is – in its entirety – politically organized in a democratic manner. The poor democracies of the region force us to think about the economy and democracy on their own terms, so as not to fall into the misconception that democracy is more resilient than it really is, or that economic transformations can be made independently of what a given society may feel and express (DDI, 2016, p. 519).

If we accept that the community implies the existence of common and shared values and that these are the values that give this community its identity and social cohesion, we could argue that in Latin America there is a human rights community, as we recognize that Human rights represent the core values of a community, which is shaped in its light. In this sense, it is argued that in the countries of the region, to a greater or lesser extent, the modernizing dynamics and secularization of the state move to other areas, including a feeling of belonging and community of values.

One such area that today determines the agenda and discussions around it – given the progress of democracy and the rule of law – is that of modern citizenship. Undoubtedly, this presupposes advancing toward the full universality of civil, political, economic, social and cultural rights, which requires the combination of the rule of law, respect for freedoms, political representation, and greater access to welfare opportunities, productive use of capacities and social protection. Ownership of social rights embodies effective belonging to society, as it implies that all citizens are included in the dynamics of development and enjoy the well-being that this development promotes (OTTONE, 2007, p. 23).

These common and shared values are expressed in the main international human rights instruments adopted in the region. On behalf of their peoples, the States represented at the IX American International Conference underline in the foreword to the 1948 Charter of the Organization of American States (OAS) that they are convinced that “a genuine sense of solidarity and good neighborliness cannot but be consolidate on this continent within the framework of democratic institutions, a regime of individual liberty and social justice, based on respect for the essential rights of man”.

At the time the 1948 American Declaration of the Rights and Duties of Man (ADRDM) was adopted, the IX American International Conference considered that “the American peoples have dignified the human person and that their national constitutions recognize that the legal and political institutions governing life in society have as their main objective the protection of the essential rights of man and the creation of circumstances enabling him to progress spiritually and materially and to achieve happiness”, and that “the international protection of human rights must be the most important guide in the progress of American law”. The formula contained at the beginning of the Foreword of the Declaration is worth mentioning, as it says that “All men are born free and equal, in dignity and in rights, and, being endowed by nature with reason and conscience, they

should conduct themselves as brothers one to another”. As is well known, a similar wording is contained in Article 1 of the Chilean Constitution.

For their part, the signatory states of the 1969 American Convention on Human Rights reaffirm their “intention to consolidate in this hemisphere, within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man”.

The Inter-American Democratic Charter of 2001 states in its foreword that “solidarity among and cooperation between American states require the political organization of those states based on the effective exercise of representative democracy, and that economic growth and social development based on justice, equity and democracy are interdependent and mutually reinforcing” and reaffirms that “the fight against poverty, and especially the elimination of extreme poverty, is essential to the promotion and consolidation of democracy and constitutes a common and shared responsibility of the American states”.

And recently, there was the 2016 American Declaration on the Rights of Indigenous Peoples, where OAS member states reaffirm that “indigenous peoples are original, diverse societies with their own identities that constitute an integral part of the Americas”.

## **2.2 Right to a healthy environment**

The Inter-American Court has made a decisive contribution to building a *corpus iuris interamericanum* in the field of human rights for a healthy environment with its Advisory Opinion on the environment and human rights n. 23/17 of November 15, 2017.

Indeed, in this Advisory Opinion, the Inter-American Court (2017, paragraphs 62 and 63) affirmed, at an international level, the right to a healthy environment as an autonomous human right:

This Court considers it important to emphasize that the right to a healthy environment as an autonomous right, unlike other rights, protects environmental components such as forests, rivers, seas and others as legal interests in themselves, even in the absence of certainty or evidence of risk to individuals. It is about protecting nature and the environment, not only because of its connection with something useful for humans or because of the effects that their degradation could have on other people’s rights, such as health, life or personal integrity, but by their importance to other living organisms with which the planet is shared, which are also deserving of protection. In this sense, the Court warns of a tendency to recognize legal personality and, therefore, the rights to nature, not only in court judgments, but also in constitutional systems.

Thus, the right to a healthy environment as an autonomous right is different from the environmental content that results from the protection of other rights, such as the right to life or the right to personal integrity.

Similarly, the Inter-American Court (2017, paragraph 59) reiterated that the human right to a healthy environment has both individual and collective aspects:

The human right to a healthy environment was understood as a right with individual and collective connotations. In its collective dimension, the right to a healthy environment is a universal interest, which is due to both present and future generations. However, the right to a healthy environment also has an individual dimension to the extent that its violation may have direct or indirect repercussions on people due to its connection with other rights, such as the right to health, personal integrity or life, and others. Environmental degradation can cause irreparable harm to humans, so a healthy environment is a fundamental right for the existence of humanity.

Finally, it should be noted that Inter-American judges emphasized that the right to a healthy environment implies certain and precise obligations of States (although it also refers to corporate obligations). In effect,

[...] the right to a healthy environment, as provided for in the Protocol of San Salvador (sic), implies the following five obligations for States: a) to guarantee to all persons, without discrimination, a healthy environment for living; b) to guarantee to all persons, without discrimination, basic public utilities; c) to promote environmental protection; d) to promote the preservation of the environment; e) to promote the improvement of the environment. It also established that the exercise of the right to a healthy environment should be guided by the criteria of availability, accessibility, sustainability, acceptability, and adaptability common to other economic, social and cultural rights. In order to review the reports of States under the Protocol of San Salvador, the OAS General Assembly approved in 2014 certain progress indicators for assessing the state of the environment based on: a) weather conditions; b) the quality and sufficiency of water sources; c) air quality; d) soil quality; e) biodiversity; f) production of polluting waste and its management; g) energy resources; and h) the state of forestry resources (CORTE HDI, 2017, para. 60).

## CONCLUSIONS

The elementary principles that underlie contemporary constitutionalism, such as popular sovereignty and government by their own consent, or the principle of real democracy and the right to participation that lies at the heart of this principle, constitute the *sustratum* of environmental democracy, and specifically the right to effective participation in the preparation, planning, design, approval and execution of development or investment projects or

proposals, particularly through environmental impact assessment systems. In short, fully meeting the rights to consultation, participation and consent in the environmental field, specifically through environmental assessment processes, amounts not only to respect for human rights linked to the protection of the environment, but even more, is a necessary assumption for realization of an actual, participatory and deliberative democracy.

These principles are designed to justify indigenous peoples' right to consultation, participation and consent in cases of involvement through investment or development projects, especially extractive projects, in their lands, territories and natural resources. Full satisfaction of these human rights is an appropriate way to prevent or deal with environmental conflicts, and this way, specify environmental governance. This assumes guaranteeing the fulfillment of the constitutional nature principle of legitimate expectations of the population, which reflects only the confidence that individuals have that the State will protect and guarantee the rights of everyone without discrimination.

In our view, human rights constitute the new common law of the 21st century. We see a principle of constitutional order which includes human rights, at least as a principle. Therefore, because, from the point of view of human dignity, it is difficult to think of more appropriate constitutional norms than human rights, we argue that these rights are normative statements with an adequately constitutional character. This highlights the importance of bringing home human rights, with the understanding that these rights represent minimum standards required by human dignity.

In contemporary constitutional law, one of the identifying features of constitutional jurisdiction is the protection of fundamental human rights. In this regard, judges who have a specific role in the protection of human rights play a constitutional role. If, like the Inter-American Court, we accept that there is a human right to a healthy environment as an autonomous with its source in and based on Inter-American human rights instruments, that right has become part of the *ius commune latinoamericanum*. In this regard, the parameters and definitions provided by the Inter-American judges in relation to this right will be fundamental, within each of the States that are parties to the Inter-American human rights protection system in order to define the minimum degree of protection of this human right to a healthy environment. It remains to be seen whether this material view of law, centered not only on their formal, but also substantive, protection and, therefore, their first-order protective role, will be taken up by national

judges, who would in that case become ordinary Inter-American judges of human rights.

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