The Civil responsibility for environmental harm in the Peruvian system

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The Thesis Abstract

1.1. Background

The concern to develop this theme goes back to our last four years of study at the Faculty of Law, motivated by reading several articles and books related to Environmental Law and Natural Resources.

After making our first research and some trials, we decided to present our paper entitled Does environmental protection in the Peruvian Civil Code?1, Which was lectured on student papers contest the International Congress of Civil Law, the same as was published, and we decided to continue the research over the years.

One of the main events that caught our interest was the growth and prosperity of the mining activity in Peru, and with it, the various social conflicts that raged around mining, the Peruvian government for lack of consultation mechanisms affected populations, and disagreements as to the economic and social development unfulfilled expectations.

Nothing is more certain is that these populations (peasant-native) are therefore suffer most from the negative impact of mining activities, communities where there is no or almost never feel the presence of the state is

providing appropriate services for education, health or better job opportunities.

Peru today is a global benchmark for investment in the exploitation of natural resources, but, however, investment and support offered by the Peruvian state extractive activities do not necessarily represent good experiences in its relationship with the diverse environment and local communities.

During the last fifteen years there are numerous negative experiences of environmental contamination, both to the detriment of the populations, as environmental heritage, non-analyzed extensively and reference only way, we will mention some of these activities.

Throughout the history of the installation of pipelines and Camisea project implementation, there were breaks in many pipelines\(^2\) and different forms of involvement to local populations, facts that were reported in various media, but without establishing penalties or concrete legal actions.

Undoubtedly, mining and pollution these days are in the eye of the storm, Yanacocha and "Mercury Contamination in Choropampa" represents the most emblematic case of environmental damage in Peru, to the detriment of the populations Choropampa peasant village-Cajamarca, reaching various court settlements sign held between Yanacocha Mining Company and numerous comuneros of Choropampa, which were challenged and ended in a long judicial process that became the First plenary Casatorio of the Supreme Court of the Republic of Peru.

This brings to mind that all extractive and industrial activity generates environmental pollution risks without the need for intent or malice to pollute, and no offense to distract the subject of our investigation; we cannot forget to mention the serious conflict social and political lapsing comes with Conga Mining Project.

1.2. Exploratory research

In our exploratory research, was resorted to various literature sources in the Peruvian Civil Law, where we highlight the Treaty on Extra contractual Civil Liability Fernando De Trazegnies teacher, who from the theory of socially tolerable damage, tries to explain the need of society to use the tools of technology (cars, planes and factories) to have a better way of life and facilitate the activities of man and, of course, pursue economic growth.

These needs of society always, at some time are opposed to environmental rights.

Professor De Trazegnies, proposed in the Drafting Committee and Civil Code Revision of 1984, including the so-called "socially unacceptable damage" where, somehow, this new course would be included as environmental damage. This proposal, after twenty-eight years, becomes noticeably absent and necessary.

The Peruvian legislature and scholars do not work and research carried out on the role to be played by the system of civil liability to environmental damage, further damage that were not designed according to environmental principles of prevention, precaution, or internalization of costs, being these, some of the topics to be addressed in this research.

You can not fail to mention the judgments of the Constitutional Court of Peru, which in repeated failures, expressed the need for sustainable use of natural resources, protection of fundamental environmental rights or need that the
various business activities are while respecting the environment and its wide regulation.

Surely Case No. 2003-0002 represents a ruling worldwide exemplary regarding to punish the high pollution by oil activities of the subsidiary (Chevron) American Company Texaco in Ecuador, Ecuadorian Judge Nicolas Zambrano⁴, compared to environmental and cultural damage condemned Chevron to pay more 8,646,000,000.00 billion dollars for repair in order to pay for the recovery of natural soil conditions ($5,396,160.00) groundwater ($600,000,000.00) of native species for at least 20 years ($200,000,000.00); mitigate-to be impossible to repair damage, health damage affected populations ($150,000,000.00); create a health system ($1,400,000,000.00), the provision of a health plan that includes treatment for people with cancer ($800,000,000.00) and community reconstruction and ethnic reaffirmation to mitigate the irreparable cultural damage caused ($100,000,000.00).

1.3. Statement of the problem

1.3.1. Situational diagnosis

Since the first industrial revolution in England, to the systematic and insatiable industrialized production, and have passed more than three centuries, and it is clear the global environmental crisis, why go through all nations, where Peru is no stranger to this crisis environment. The same we consider good reasons for international organizations, countries, and NGOs, to address their worries and various programs that seek to implement measures of prevention, protection, real and effective restoration of the environment⁴.

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³ Sentence Case 2003-00002 Ecuador Vs. Texaco
Pollution is very diverse. Some cases that can be mentioned are: contamination of beach areas or marine waters creating radioactive clouds (Chernobyl case), adulterated foodstuffs, acid rain, air pollution, pollution of the ozone layer, noise pollution, pollution by mining and industrial activity, pollution of the men to disperse the solid and liquid waste to the environment, without hesitation or liability.

This same principle of "healthy environment" is incorporated in the 1993 Constitution which states in Article 2, paragraph 22, which considers as a fundamental right "to peace, tranquility, to leisure and rest, and as to enjoy a balanced environment suitable for the development of their life."

These environmental principles are embodied in some rulings of the Supreme Court and the Constitutional Court through the Environmental Protection, began offering a first procedural protection of the right to enjoy a healthy environment, interpreted as the right to protection health, decent life and the principle of sustainable development

In this regard the principle enjoy a healthy environment and sustainable development is systematically incorporated into the main Peruvian legal system laws such as the Civil Procedure Code, the Code of Constitutional Law Administrative Process and 2005 promulgating the General Environmental Law n. ° 28611, legislation that established the legal mechanisms for protection of environmental rights from judicial and administrative procedures. Unfortunately, for this environmental law, to date, not yet promulgated its regulations, why cannot require compliance with its principles and environmental regulations.

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5 We are locating new environmental problems such as desertification, the greenhouse effect, the raising sea levels, floods, droughts and storms. The man is building tecnopolis and mega polis; cities with unbreathable air, polluting rivers, lakes, has caused holes in the ozone layer, climate has warmed the earth for accelerated combustion of extraordinary proportions in the last hundred years.

In our opinion, there is no regulation for this law due to lack of political will of the Executive and the Legislative, and economic interests of many groups who do not want to consider the environmental costs of their business activities.

The main motive of our research is manifest from the establishment of a civil protection stops providing the Civil Code against environmental damage, from the standpoint of civil liability, which shall be questioned in some points of our research to be a institution that does not fit with the new environmental damage from increased economic activity and industrialization.

From the perspective of the protection that should grant the right to the environment, we cannot remember and rethink the role of the law regarding the protection of the environment and, in particular, the Civil Law. Within this discipline we place liability, it must play a fundamental role based on prevention, so that a section of the doctrine is rethinking the liability system toward a new tort law, placing emphasis on compensation new damages that are causing the excessive industrial and technological mechanization, in which we place the environmental damage that can be individual and collective harm and property damage and non-material damage.

Environmental damages are externalities that, in most occasions, are costs transferred (by companies, the state or individuals) to the company or product victims of environmental pollution.

From exploratory research we have verified that there would be a gap in the regulation of civil responsibility for environmental damage in the Peruvian Civil Code and its application in the administrative and judicial mechanisms, environmental damage is not legislated and understood as a new assumption of civil responsibility, there is a lack of this legal institution by judges, lawyers and law students.

1.3.2. Research Questions
a) What is the role it must fulfilled by the system of civil responsibility for environmental damage in Peru, compared to cases like mercury spill in Choropampa Yanachocha, pollution occurred by Doe Run in La Oroya or damage caused by informal mining in Madre de Dios?

b) Does the system of environmental civil responsibility must be based on the precautionary principle to the repeated instances of pollution and environmental rights breach by various industrial activities?

c) Is there a proper regulation of environmental damage in the General Environmental Law?

d) The Peruvian Civil Code provides adequate guardianship against environmental damage?

e) What would be the new challenges that must meet a system of environmental civil responsibility?

1.3.3. Research objectives

a) General objectives

- Determine Legal nature of environmental damage.
- Identify the regulation and treatment of environmental damage.
- Adopt rules designed of civil responsibility for environmental damage.
- Set which are the institutions of the Civil Code those establish some form of civil guardianship against environmental damage.
b) Special objectives

- Analyze national regulation for environmental damage.
- Set the reaches of the principles of juridical institutions of environmental law and its relationship to civil responsibility.
- Set whether there are regulatory legal loopholes or omissions with respect to environmental damage and the respective penalty for their production.
- Identify ways and procedural requirements for bringing environmental actions.

1.3.4. Accuracy of the Problem

Main Problem
What is environmental harm and what is the regulation of legal responsibility for environmental damage production in Peru?

Secondary problem 1
Is it enough national regulation of legal responsibility for environmental damage output to ensure the protection of the environment?

Secondary problem 2
What are the rules and actions for juridical systematization of environmental harm?

1.3.5. Justification
In the situational diagnosis we refer to in very generally about the various forms of pollution and of environmental harm production in Peru, due to increased investment on the exploitation of natural resources.

Activities such as mining, hydrocarbons exploitation and other forms of industry, by their nature, represent industries that generate pollution, being administratively regulated by the standards of environmental quality and the maximum permissible limits, but the problem becomes that this regulation administrative sanctions administratively illegal, this represents a very limited administrative environmental justice against the full scope of environmental harm.

Having no adequate and special regime from civil liability for environmental harm, consequently generating legal uncertainty for investors, The State and surrounding populations, the regulation of environmental harm coated with precise and specific principles, will be useful and generate legal security for Companies, the state and communities, aimed at preventing any environmental damage before assuming the cost and consequences of polluting act having made any contaminating action the courts should have proper criteria to explain the juridical nature of environmental damage and set adequate and fair compensation, an environmental policy of prevention, compensation and punishment of environmental damage that the state support to fulfill its role as a promoter of private investment and protect the interests of the nation, in the where populations and extractive companies generate environmental conflicts.

There is a gap in the Peruvian Civil Code regarding the regulation of some assumption from civil responsibility for environmental damage, and although there is an environmental regulation in the General Environmental Law, this would not be the most appropriate to the characteristics of environmental damage and environmental principles of a system of environmental responsibility. That’s why there is a need to identify the loopholes between the Civil Code and the General Law of the Environment to establish an adequate systematization of environmental damage.
In the presence of environmental damage, our investigation is justified respect to proposals that are provided to reform systematization of environmental damage in the General Law of the Environment and the need to implement judicial reform concerning the guardianship of environmental rights and the granting precautionary measures, which should be guided by the precautionary principle to establish precautionary processes at once and without delay, the establishment of an environmental court of national jurisdiction and, by the Ministry of Environment, shaping the creation of environmental Arbitration by the Court Environmental Dispute Resolution, which shall lie with the administration of the Ministry of Environment.

1.3.6. The Significance

The significance of this thesis lies in providing a contribution doctrine and jurisprudence, analyzing various cases by environmental damage, which do not apply the general principles of environmental law and determined that the institution of civil responsibility, such as regulated in Peru, you can not play the role it must play a proper environmental justice.

It is essential that prosecutors, judges and lawyers, to assume an environmental cause, may make the application of the principles of environmental law: prevention, precaution, polluter pays and access to environmental justice.

It is also important to note that both the judges and lawyers, for the most part are unaware of the concepts and juridical notions of environmental law and environmental damage, which can not lead to an appropriate environmental judicial process and in the for lawyers, conduct a full sponsorship and ad-hoc environmental causes.

The civil and procedural guardianship of individual and collective environmental rights importance is highlighted by the current situation to the
various environmental problems that are occurring, such as global warming. In this sense, Peru is one of the most important areas of global biodiversity; we will become one of the countries most vulnerable to climate change actual that is occurring. Similarly, we must add the problem of environmental conflicts between mining companies and rural communities, which are social and political problems that are compounded even more so when there are indications polluting activities. However, the state shows no front facing attitude judicial sanction that would be imposed on polluting companies widely and economically significant.

1.4. Hypothesis

1.4.1. Main Hypothesis

Environmental harm is a damage sui generis, because violates a set of fundamental rights (life, health, property, freedom, etc.) Of the person, and this is a patrimonial and non-patrimonial damage, collective and individual, being its magnitude very harmful and complicated as to determine the real scope and impact of all polluting activity, whether mining or industrial.

The regulation of civil responsibility for environmental damage in the Peruvian Civil Code is almost zero, and which is in the General Environmental Law is confusing, ambiguous and imprecise, and consequently, there is inadequate regulation that provides effective protection from damage environment.

1.4.2. Secondary Hypothesis

a) Secondary Hypothesis 1

It is not enough regulation of legal responsibility for environmental damage, because the Peruvian Civil Code and the General Environmental Law contain inconsistencies, contradictions and loopholes, which would be relevant for the formation of a special law to guarantee the protection the environment for environmental damage.
b) **Secondary Hypothesis 2**

The bases and actions of a juridical systematization of environmental damage, it must be on a set of environmental principles such as: of the prevention principle, the precautionary principle, the polluter pays principle and the principle of access to environmental justice.

1.5. **Type research**

The research is qualitative

1.6. **Research Design**

The design of this research is descriptive, for this purpose, it was possible to obtain as research sources: legislation, doctrine, domestic and foreign jurisprudence, it was possible to make interviews with teachers and magistrates who have had experience in civil liability and environmental law jurisdictions both in academic and in professional practice.

**Chapter II: The environment as a fundamental right.** –

It addresses the relationship of the environment and its components from the perspective of constitutional environmental law, scope issued by the Constitutional Court and the National Environmental Policy, in the following order: 2.1. The Right to a balanced environment and fundamental rights, 2.2. The State and Environmental Policy 2.3. The fundamental right to an adequate and balanced environment in the Constitution, 2.3.1. Basic right and duty, 2.3.2. Right to life, 2.3.3. Right to health, 2.3.4. Right to property, 2.4. The State and Natural Resources in the Constitution, 2.5. Environment and economic development

**Chapter III: Civil responsibility and environmental damage.** –

This chapter examines the institutions of the Peruvian Civil Code and seeks to identify the form of protection that could be provided in environmental

**Chapter IV: Principles of environmental liability system in the General Environmental Law.**

The Act incorporates environmental principles into our law, international environmental law, these principles discussed extensively and thoroughly, the points of principle study: 4.1. Basic right and duty, 4.2. Right of access to environmental justice 4.3. The prevention principle 4.4. The precautionary
principle, 4.4.1. The precautionary principle and its relationship with risk, 4.5. The principle of cost internalization or polluter pays, 4.6. The repair, restoration and compensation and 4.7. Considerations for environmental compensation.

Chapter V: Environmental justice and procedural protection of environmental rights.

This chapter performs the analysis of the application of the principle of environmental justice in Peru, with reference to judgments of the Constitutional Court, the Supreme Court and the European Courts, deserves a major analysis Chevron v. Ecuador Case, another important point expresses the requirements, legitimacy, procedural limitations and implications of actions in protection of environmental rights protection from environmental damage.

The environmental and regulatory arbitrage is raised as proposed mechanism of settlement of environmental disputes, the points of this chapter are: 5.1. Relevant Judgments of the Constitutional Court on environmental issues, 5.2. The environmental protection, 5.2.1. Appeal for legal protection of environment, 5.3. The Compliance Process La Oroya Case - Doerun, 5.3.1. La Oroya in the Inter-American Court of Human Rights, 5.4. Process Unconstitutional - Municipality of Miraflores, 5.5. Civil processes and problems in accessing environmental judicial protection, 5.6. Procedural requirements of procedural protection of environmental rights, 5.6.1. Legitimacy, 5.6.2. Prescription of action 5.6.3. The claim for environmental damage, 5.6.4. Precautionary Measures, 5.6.5. The Public Environmental protection, 5.6.6. The private environmental protection, 5.6.7. Environmental rights diffuse 5.6.8. Pollution and the First Plenary Choropampa Casatorio, 5.7. Environmental Arbitration, 5.7.1. Disputes submitted to arbitral tribunal's jurisdiction, 5.7.2. Limits the award, 5.8. Environmental justice in Peru, 5.9. International Precedents Guardianship of environmental rights, 5.9.1. The
Chapter VI: Rules and Actions for a legal systematization of environmental damage

6.1. The Legal Nature of environmental harm

It is not possible to outline the concepts of the legal nature around environmental damage without regard to the generation of pollution and environmental harm, are a problem in Peru and different countries in the international context, only by way of reference, the incident was alarming following the catastrophic earthquake in Japan in 2011, Fujushima nuclear plant had several radioactive leaks, causing great alarm among Japanese and people in neighboring countries, by threats of various forms of food contamination and impact on the people, there is no doubt that the risk of nuclear activity, it becomes an environmental catastrophe could occur due to the nuclear contamination, certainly the role that the state can exercise against the policies and environmental requirements for companies, stocks aimed at meeting state standards: safety rules, and environmental quality in nuclear activities.

However, for more standards and mechanisms for preventing, at any time these nuclear activities can become a nuclear catastrophe, as was the accident at the Chernobyl Nuclear Power Plant.

The rapid growth of industrial activities and the technology used by humans, represent the potential to generate several environmental damage through the use of objects or risky activities not carried out with due diligence application or simply for a fortuitous event or force larger acts could generate pollutants by Corporations or Individuals interchangeably, our current society and its constant technological and industrial progress always represent latent possibilities of generating acts of pollution that cause environmental damage.
Environmental harm is a damage sui generis, because violates a set of fundamental rights (life, morals, health, property, freedom, etc.) Of the person, and this is a patrimonial and non-patrimonial damage, collective and individual, meeting their magnitude very harmful and complicated as to determine the real scope and impact of all polluting activity, whether mining or industrial.

The doctrine, jurisprudence and Peruvian law have failed in all this time to provide an accurate and relevant definition true extent of environmental damage, being generated by economic growth and lack of appropriate environmental management mechanisms where the state has little presence lack of expertise and political will to carry out its functions to inspection and penalty.

Renowned civilists teachers as Fernando de Trazegnies, Alfredo Bullard and Leysser Leon in interviews conducted in gathering information about our thesis, agree that the legislature of the Civil Code of 1984 not designed a civil protection legal context regarding the protection of environmental damage because only provides a set of rules and general principles concerning the contractual responsibility.

Thus environmental damage represents a different damage from traditional civil harm which is part of civil liability system, being, therefore, that environmental damage is covered with unique and distinct to patrimonial damage, non-material damage, moral damage, damage to the person.

The environmental damage has its own characteristics and unique, being the following:

a) **Numerous victims.** - The occurrence of a polluting activity and consequently the generation of environmental damage, is a large-scale pollution brings countless victims, pollution from a factory against a neighborhood produce pollution to neighbors,
pedestrians and in general as long as the polluting activity could not count the number of victims.

This difficulty could be advantageous to the subject pollutant when the difficulty exist to identify and group the number of victims, the defendant may invoke the strategy of prescription and limitation of actions process, however in the opinion of some litigators could represent a risk against Presumed polluting agent, because any «new victim» could apply to join the proceedings as civil or third co-parties, in short the difficulty of identifying victims is generated difficulty for plaintiffs, defendants and the State.

b) **Cross-border damage incalculable geographically.** - Environmental damage crosses geographical boundaries and borders, often do not matter jurisdiction or state that was generated first and more alarming, the extension that environmental damage occurs to other countries and its extension to many populations and ecosystems.

Being an international environmental damage and which extend throughout the territory of a determined country.

A clear example that environmental damage can cross borders, located on the Danube River pollution, which has a length of 2,870 km, from Germany to the black sea, through 19 countries welcoming almost 83 million inhabitants.

The Danube river has a different pollution because it became turbid the drainage sewage, pesticides and chemicals without treatment.

But, besides pollution, the Danube is also being affected by the rapid growth of river transport and European Union authorities
consider that the flow of boats on the river to double in the next 10 years.

Among other polluted rivers, we have the River Plate between Argentina and Uruguay and the Indus River, between Afghanistan and Pakistan.

c) **Difficulty of economic quantification.** – The polluter - payer is designed so that the Judge can impose a fair and just financial compensation for the victim (s) of environmental damage, but this function to grant an amount of compensation becomes no doubt in a complicated and scientific, because the magistrate with the current justice system lacks of legal instruments (law, doctrine) and technical (jurisdictional and specialized experts servers) that allow the judicial grant a fair compensation amount equitable.

The current system of judicial compensation, it is disappointing, because the amounts awarded as compensation for damage to life and health are negligible amounts and do not represent a fair economic compensation, in damages against the victim does not take into account the real economic status of the agent that caused the damage against his victim.

Quantifying the economic value of pollution a river or extinction of species of fauna and flora could represent the quantification of incalculable sums.

Perhaps it is more convenient to perform a mathematical exercise to quantify the damage to life, health, property or patrimonial rights result of a polluting activity that generated environmental damage while considering certain criteria such as pressure media social, political, economic and cultural, the Judge would have when setting in a judgment a sum for damages.
If you accomplish make an economic quantification of environmental damage this figure would be unfair for the victims, because consider that the damage is greater than the amount set by the Judge and by the defendant because the amount fixed by the court is excessive and unrelated to the damage caused, and that the sum would become the economic and business bankruptcy of an economic agent.

The environmental compensation amount awarded by the "Ad Quo will always be challenged via appeal judgment, incurring a greater difficulty for the Court which entrusted a reassessment of the criteria for fixing the amount of environmental compensation established by the Ad quo, an Arbitral Tribunal could not be left out of this difficulty facing the economic quantification of environmental damage.

d) **Violation of patrimonial and non-patrimonial rights.** - One difference of environmental damage compared to traditional civil damage is framed regarding the environmental damage violates patrimonial rights: the right of ownership and economic opportunities frustration polluting activities, for example: the termination or non-renewal of leases, sale of property at extremely low due to the contamination zone is located, the lower production of crops to be irrigated with contaminated water or fishing impediment making pollution of river and sea waters, and these assumptions under which victims identify the environmental damage as the cause of the loss or diminution of its assets or the frustration of economic gain, it is necessary to the proper and basic damages theory and loss of earnings, up forms invoke relevant for fair and just compensation for the generation of economic environmental damage.
The damages to life and health, although are fundamental rights protected by the Constitution and the Civil Code, these damages at the same time generate economic prejudice against the estate of the victim (s), a person who contracts fumes result of cancer or lung disease, that peasant or native using contaminated water for their daily activities (feeding and grooming), necessarily solve shall incur into payments for doctor visits, medicines and various health services, generating an expenditure of funds that were not necessary to assume, otherwise are harmed by a polluting activity, but for survival and quality of life the victim (s) or the state shall bear these expenses, without question the rights of life and health are the cornerstones to avoid any environmental damage human cost.

Environmental rights non-property are comprised of moral damage caused to the victim because living in contaminated areas or having a disease (caused by contamination) bring suffering or feeling of distress before activity contaminant not suffered, the moral damage has two dimensions individual moral damage and collective moral damage.

Cultural Environmental damage\(^7\) could be expressed as the feeling of suffering from a rural or urban community because the enjoyment of a public environmental good (air quality, river, landscape, park, forest) ceased to exist or are eyewitnesses to the daily deterioration of collective environmental good which generates a collective cultural and environmental damage, this damage was expressed in the judgment of the Chevron case,

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\(^7\) The Sentence highlights the environmental damage culture, derived from the impact suffered by indigenous peoples can be considered as environmental damage, is the cultural damage caused by forced displacement due primarily to the impact suffered by us and by land and declining species served for traditional hunting and fishing, which has forced them to change their habits.
regarding the cultural damage suffered by indigenous peoples of the Amazon of Ecuador in the various camps and facilities Industry Chevron Oil Company.

e) **Contamination of public and private property.** – The public and private property are regulated by special laws and requires no for sake of completeness, it is noteworthy that the act contaminant environmental damage does not discriminate between a public good (river, forest) or private property, a polluting activity causes damage to private property a legal or natural person and at the same time causes damage to the property of the state.

It is necessary to emphasize that it should fulfill the environmental administrative law through the implementation of various environmental management systems and permanent control, these actions frame the possibility of environmental damage is not generated by mining and industrial activities that run authorizations, permits, licenses, concessions from relevant ministries, if the Environment Ministry fulfills this role to monitor and punish cases could reduce pollution by companies duly authorized to perform mining and industrial activities and reducing them of pollution on public and private property would be essential to avoid creating environmental damage public and private property.

f) **The burden of proof.** – The Burden of proof of environmental damage is a major legal and scientific difficulty regarding the measurement of the degree of contamination.

The burden of proof is complex and difficult because of the number of victims, subject pollutants, experts and its diffuse
nature; an excellent testimony of proof of environmental damage is in our analysis of the decision in Chevron vs. Ecuador.

The activities that generate pollutants environmental damage are predominantly of collective and private interest, not only in the present, but rather in the future and involves natural people unborn, unlike the civil damage usually affects individuals or their property and rarely extend across generations.

Even though following the principles outlined in these international legal instruments, several countries have tried to establish responsibility systems for environmental damage in the strict sense, there are few laws that distinguish between damage repair, property and individual damage to the environment (pure environmental damage)\(^8\).

The proof of the act of environmental damage represents a difficulty when identifying the impairment or violation of environmental rights with respect to property rights, non patrimonial, individual and collective, against a polluting activity, become in reducing the vital fitness man from the inner sphere (penalties, suffering, anguish) or health and life expectancy.

The proof of the causal relationship between the activity performed by one person and the injury to another is as already indicated, one of the biggest difficulties presented in the practice of responsibility issues. In theory the concept is very simple: it is to determine the existence of a link between two realities, so that it can be said that (damage) is a consequence of the other (activity).

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The difficulty in obtaining financial and professional resources that can route to carry out checks, represent limits when identifying the sources and pollutants subject, these experts’ fees are almost always out of reach of the victims of environmental damage and the involvement of various skills can turn into countless errands expert debates and oppositions.

We share the view arrived by the European Union regarding the burden of proof "In environmental cases can be very difficult for a plaintiff and easier for a defendant to establish facts concerning the existence (or absence) of a relationship cause and effect of an act of the defendant and the damage. For this reason various national environmental liability regimes have provisions designed to reduce the burden of proof in favor of the plaintiff with regard to the demonstration of fault or causation. The Community regime could also contain one of these forms of reduction of the burden of the traditional proof, whose specific definition would at a later stage." ⁹

It is essential to note that the presence of a clear environmental damage the burden of proof may be reversed and be the pollutant who should certify that they did not made the polluting activity or that its activity is regulated within the administrative environmental limits, notwithstanding that all polluting activity causes harm and therefore environmental responsibility.

It is essential to note that the presence of a clear environmental damage the burden of proof may be invested and be the pollutant agent who would have to certify that they made the polluting activity or that its activity is regulated within the "limits administrative environment, without prejudice to any damages

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polluting activity and thus generates environmental responsibility.

6.2. Environmental regulations because of the production of environmental damage

The Peruvian Civil Code does not regulate under any legal institution, production and protection from environmental damage. This creates a problem for the law enforcement agents, lacking a civil standard that provides an adequate guardianship of environmental damage. While the General Environmental Law incorporates environmental responsibility, but confusingly regulated, flawed and wrong, based on subjective and objective system of the general theory of responsibility.

In this sense Ferrando, says "Although it is regrettable to admit, before the year 2005, the liability for environmental damage was not legislated special rules and there was uncertainty when performing a civil guardianship, with the exception of some isolated legal rules concerning the civil responsibility under some environmental court very specific activity, there was in Peru a legal framework that integrates in a systematic and orderly principles that form, nor the mechanisms and systems to address it."\(^{10}\)

The regulation of civil responsibility for environmental damage in the Peruvian Civil Code is almost nonexistent, and that is in the General Environmental Law is confusing, ambiguous and imprecise, and consequently, there is inadequate regulation that provides effective protection from damage environment. The General Environmental Law, in providing a unified regime subjective and objective regime of environmental civil responsibility, presents some contradictions and

\(^{10}\) Ferrando, Enrique (agosto 2000, pp. 10 y ss.). *La responsabilidad ambiental por daño ambiental en el Perú, reflexión y debate.* Lima: Peruvian Society for Environmental Law.
inaccuracies, and these points that arrive our analysis, critique and proposal.

Our civil liability system today, you have to respond to new needs. Civil liability is a mechanism to compensate for the damage caused, i.e. serves a remedial purpose or damages, but must also be designed to prevent the production of further damage and eradicate completely.

This is consistent with the juridical nature of environmental damage, in essence, is preventive in nature rather than compensable. Annotate, then, that environmental damage is always irreparable damage and there is necessity for the precautionary principle should be incorporated into the legal system as a form of immediate halt against the threat of environmental damage or paralysis.

6.3. **The proper systematization of environmental damage**

We believe that the regulation of production for environmental damage in the Peruvian legal system is not enough, because one of the functions of environmental responsibility should be based on prevention, application of the precautionary principle and appropriate criteria for fixing compensation under the polluter-pays principle.

If, in the presence of special laws that regulate environmental damage are presented serious problems of systematization, is much more concerned about the uncertainty that the courts have from legal process which seeks to compensate for environmental damage, either through lack of knowledge of nature legal environmental damage or almost no case law established by the courts of Peru, without mentioning the procedural issues regarding standing to work, surveys, burden of proof and the pressing need to incorporate new environmental principles environmental process actors requires environmental specialists and other support professionals.
No less important is specified that without regulation, the chapter on environmental responsibility of the General Law of the Environment, provides an overview of legal paralysis, which creates legal uncertainty environment.

The bases and actions of a legal systematization of environmental damage, it must be on a set of environmental principles such as: the precautionary principle, the precautionary principle, the polluter pays principle and the principle of access to environmental justice.

The precautionary principle becomes evident importance for its application in administrative and judicial proceedings, at times that can punish or stop time the polluting activities.

For these reasons we affirm that adequate systematization of environmental damage should be structured based on four principles:

i. Prevention;
ii. Precautionary;
iii. Polluter-pays;

These environmental principles, which aim to provide adequate legal systematization of environmental damage, are not regulated in the Civil Code.

More remarkable is the lack of procedural rules aimed at immediate stoppage of environmental damage, in reference to the precautionary measures regarding standing and wide to bring actions, which, you understand many judges, is just individual, restricting to this criterion extensive procedural legitimacy wrong, that environmental is
established by reference to the principle of access to environmental justice.

Among the procedural actions must implement efficient and economic mechanisms that respond to the specialty of environmental damage, such as:

**a) Precautionary measures ex officio.** – Considering that environmental damage has characteristics different from traditional environmental damage is necessary to be able to shield the process of enforcing environmental rights through trade Precautionary Measures which must be filed with the presence of environmental damage diffuse and has the features only urgent regarding that inevitably effected an act excessively harmful pollutant or contaminant activity impair environmental havoc diffuse rights, this prerogative could have the judge should be used in extreme cases of inevitable contamination or the urgency of stopping the polluting activity.

**b) National Environmental Court.** – With the establishment of the Special Prosecutor for Environmental Matters, and in order to provide more procedural tools to Environmental Justice, it is essential to form a national competition Environmental Court to exercise jurisdiction of environmental processes civil, criminal and administrative litigation, it is essential that specialized judges and judicial officers to pay court work designed to provide effective judicial protection of environmental rights and all forms of environmental pollution that causes damage, whether caused by a natural or legal person as of private and public law.

**c) Exemption from court fees.** - It is necessary to exempt from court fees to plaintiffs or victims of pollution, this need will be
much notary in those rural and native communities, where economic resources to afford to pay legal fees simply are impossible to assume, there should be an exemption procedure legal fees those natural or legal persons (NGOs and / or association) that have the financial resources and verify the actual state of poverty, which would be granting access to justice environment.

d) Environmental Surveys. - According to our statement the burden of proof on the occurrence of environmental damage is undoubtedly the fundamental problem for the system of environmental responsibility, because the pollution event is complexity with respect to the location of the generating sources of pollution and professionals, technicians and experts who would be involved to cast their expert opinion regarding the nuances and complexities of environmental damage, which has different nuances.

An expert (s) in an environmental process necessarily count on the participation of engineers (environmental, metallurgical, oil and civilian) medical (specialized in various areas such as Oncology), accountants, psychologists and economists, which according to its expert reports should determine whether there was environmental damage patrimonial nature, not wealth, health damage, moral damage and being the most important role of causality search on the subject to determine whether contaminant was in the possibility of avoiding the polluting activity or whether it made contaminant action within the limits permitted by environmental regulations.

Expert reports could be used to determine the approximation of the defense of environmental responsibility in the event that the pollutant can assume its defense at application of theory
fortuitous event or force majeure, these expertises could give an approximation of the Judicial if you really could have been prevented or taken urgent measures to prevent environmental damage because damage generator is who has the ability to prevent and mitigate damage their polluting activities in haste and anticipation as their environmental policies.

As described, the broad activity expert in the course of this process see the proof stage will be most important, controversial, and complicated to access the site locations, such as industrial facilities (mining, hydrocarbons and factories), mountaintops, many victims (medical evaluations, interviews and testimony) in all geographic locations adestré access, due to climatic conditions and transport pathways.

Is fundamental that a Cross Environmental Expert institution that is formed by various specialists in different sciences and professions that allow for a real and true extent of environmental damage and the state to assume the payment of these expertises in those environmental damage against diffuse rights or in the course where the victim in a state of absolute poverty does not have the financial resources to take on the high costs of expertise in a process environment.

e) Participation of the Attorney of the Ministry of Environment. - Is required to provide the Ministry of Environment of attorneys who can bring the defense of environmental rights diffuse in different regions of the country, it is critical that the Environment Ministry not only to exercise the functions of control and sanction but procedural defense of the occurrence of environmental damage, considering that the Procurators of Local and Regional Governments, lack of expertise and a system of coordination with the Executive
branch entities that could assist with procedural defense system to the violation of environmental damage.

f) **The environmental arbitration administered.** - The need to establish mechanisms for settling environmental disputes is an urgent need, given the constant generation of various environmental conflicts that poses serious problems between the main actors: the state, communities (rural, native and civil society) and extractive companies and different industries.

A Court of Environmental Dispute Resolution could be an administrative procedure that contributes to environmental conflicts may have at first a rapprochement between the direct actors of the conflict and second, that the knowledge of this environmental conflict has the presence and participation of a set of professionals (lawyers, engineers, doctors, psychologists and sociologists, etc.) that would grant rules, guidelines and directives in the negotiations regarding the implementation of the Conciliation and Arbitration Court have the presence of specialized arbitrators and full environmental regulations knowledge of other sciences and professions that will allow the issuance of the arbitration award has the rigor and expertise through the knowledge of environmental conflict.

In a previous subchapter we refer to the limits and have the arbitral award arbitral matters, certainly the implementation of Environmental Administrative Arbitration necessarily have to file a special regulation and procedural nature a very important budget item.

6.4. **Conclusions**
a) The Peruvian Civil Code of 1984, does not present an explicit provision for a legal institution designed to provide civil protection from environmental damage.

b) Environmental damage is a new liability assumption, which has features exclusively applicable legal and procedural environmental rights.

c) The General Environmental Law presents an inadequate systematization of environmental liability therefore becomes to be ambiguous, imprecise and successful, generating uncertainty when invoking and managing environmental justice.

d) The current tort system regulated by the Civil Code, the General Environmental Law and Civil Procedure Code, have difficulties with the presentation of evidence for environmental damage.

e) The systematization of environmental damage should be structured in the unification of environmental principles: Prevention, Precautionary, Repair and Sanctioning.

f) Environmental responsibility is essentially a tort.

g) The periods of limitation of actions for environmental damage must be plus two years for personal injury - equity and diffuse damage for ten years.

h) The current judicial system presents difficulties of access to environmental justice to the affected people in their environmental rights, from aspects of economic and procedural nature.
i) Environmental damage presents difficulties regarding the identification of victims and economic quantification of the damage caused to their detriment.

6.5. Proposals

a) Preparation of a Draft Law for systematizing and properly regulate the Environmental Damage as the institutions of the Peruvian Civil Code and environmental law institutions regulated by the General Law of the Environment.

b) Creation of a Specialized Court on Environmental Supranational allowing competition subjecting judges and courts specialized servers for damage processes and environmental rights, taking into consideration that the Special Prosecutor for Environmental Matters, has been performing judicial work in different districts court of the country.

b) The Formation of Environmental Dispute Tribunal and the promotion of Environmental Administrative Arbitration as a means of resolving environmental conflicts, which must be circumscribed within the competence of the Ministry of Environment.
Referencias bibliográficas:


Albaladejo, Manuel (1985). Sobre la solidaridad o mancomunidad de los obligados a responder por acto ilícito común. *ADC*, abril-junio MCMLXIII, tomo XVI, fasc. II.


1999.


Código Procesal Civil (CPC).


De la Puente Brunke, Lorenzo. Medio ambiente, conflictos y seguridad jurídica en la minería peruana. Revista Peruana de Derecho de la Empresa. Lima, n.º 59, año XX.


El Comercio, 22 de junio de 2010.


Estudio de Impacto Ambiental (EIA).


Ley n.º 28611, Ley General del Ambiente.


Madrid, tomo I.


Lettera, Francesco. Lo stato ambientale e le generazione future. En Rivistagiuridica dell’Ambiente, n.$^9$ 2, anno VII.


Editores, tomo I.


Fondo Editorial de la Pontificia Universidad Católica del Perú, n.° 14.


Programa de Adecuación y Manejo Ambiental (PAMA).


Sentencia Caso n.° 2003 -00002 Ecuador vs. Texaco.


Wieland, Patrick. Ecologista y Liberales. Ius et Veritas, n.º 26, año XIII.
