

## RECURSO DE PROTECCIÓN IN ENVIRONMENTAL ISSUES: RECENT CASE LAW (2017)

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### Abstract

This paper aims to illustrate the Supreme Court's reasoning regarding *recursos de protección* in environmental issues. The analysis shall focus on whether the Supreme Court has been acting with deference to the powers of the new environmental courts and administrative agencies with environmental competence. This paper defends the hypothesis that the Supreme Court's criterion has not been consistent, since it has sometimes upheld the *recursos de protección*, whereas at other times, it has rejected them, arguing that these conflicts must be resolved by the new environmental institutions.

**Keywords:** *Environmental Law, Supreme Court, case law, environmental institutions, deference, environmental courts.*

### I. INTRODUCTION

On January 30<sup>th</sup>, 2017, an unexpected ruling<sup>1</sup> of the Supreme Court upheld a *Recurso de Protección* against a Resolution<sup>2</sup> that prematurely terminated the indigenous consultation process, thus leading to the subsequent approval of the Environmental Qualification Resolution (hereinafter, RCA) of the *Penco Lirquén LNG Terminal* power project.<sup>3</sup> Said ruling was striking, since the Court's decision to roll the entire procedure back to the indigenous consultation stage was made within the framework of a *recurso de protección*, and not by means of the special legal remedies provided for in the environmental law. Nonetheless, in the decision on the *Los Cóncores Backup Power Plant*,<sup>4</sup> issued barely five months later, the Supreme Court itself stated that the *Recurso de Protección* was not the appropriate vehicle to discuss these matters. This, given that since the law created the environmental courts, these matters were to be discussed therein, due to the fact that the procedure has a special regulation.

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1 *Asociación Indígena Koñintu Lafken-Mapu Penco y otros vs. Servicio de Evaluación Ambiental Región Biobío Y Comisión de Evaluación Ambiental Región Biobío* (2017).

2 Exempt Resolution No. 214 (2016).

3 Of Octopus UNG SpA.

4 *Yáñez Veas, Wendy del Carmen vs. Comisión de Evaluación Ambiental de la Región De Coquimbo y Prime Energía SpA* (2017).

The key aim of this paper is to conduct a critical analysis of the manner in which the judiciary –and most especially the Supreme Court– is ruling on environmental conflicts. Furthermore, it will discuss the criteria and grounds used by the Supreme Court when ruling on the validity of an environmental administrative act within the framework of a *recurso de protección*, and whether the Supreme Court's criteria to uphold or dismiss this type of actions are consistent. Thus, the main issue of this paper is to (i) conduct a critical analysis of the appropriateness of the Supreme Court ruling on environmental matters when processing *Recurros de Protección*, and (ii) analyze the grounds used by the Supreme Court when called to decide on a challenged environmental administrative act, in order to see whether its rulings in this regard are consistent.

Today, many projects that received a favorable RCA have been subsequently challenged by the parties affected by the implementation thereof, who have filed *Recurros de Protección* in order for said Resolution to be invalidated. The Supreme Court has often upheld these actions based on the violation of fundamental rights enshrined in the Constitution of the Republic (hereinafter, CPR), usually the right to equality (Article 19 No. 2) and the right to live in a pollution-free environment (article 19, No. 8). However, this phenomenon neutralizes the entire environmental administrative procedure provided for in our legal system, since this type of resolutions are not being challenged through the procedure set out in the special regulation, thus distorting environmental law as a whole.

To conduct this analysis, this paper will be structured as follows: (i) chapter I will discuss those actions by means of which stakeholders can challenge certain administrative acts under environmental law, both administratively and in the environmental courts. It will also conduct a descriptive analysis of the *Recurso de Protección*; (ii) then, based on certain cases relevant to the subject matter of this analysis, it will study the evolution of those grounds that the Supreme Court has used when ruling on *recursos de protección* filed against environmental administrative acts, focusing on its jurisprudential criteria in three rulings of year 2017; (iii) subsequently, it will address the problem that these matters are being resolved within the framework of the *Recurso de Protección*, and also the reasoning of the Supreme Court in these matters. The aim is to analyze the conflict between the Supreme Court's criteria when deciding on environmental acts challenged by means of *recursos de protección* and that of courts specializing in this field, i.e., environmental courts; and (iv) it will suggest that the Supreme Court should only uphold *recursos de protección* when the challenged act is likely to violate constitutional rights requiring urgent protection, but that it should refrain from defining technical procedural decisions of the Administration or inherent to environmental courts.

In this sense, the hypothesis defended in this paper is that the Supreme Court is empowered to decide on an environmental administrative act challenged by means of a *Recurso de Protección* only when the fundamental right to live in a pollution-free environment or other fundamental right is likely to be violated or threatened. In all other cases, the Supreme Court must act with deference to the technical decisions of the Administration and to the special jurisdictional mechanisms to challenge these acts.

## II. ENVIRONMENTAL REMEDIES

### 2.1. Special environmental legal actions filed with administration agencies and in court

In 1992, the legislative branch proposed the creation of new environmental institutions in order for Chile to be in line with globalized standards,<sup>5</sup> i.e., to protect the environment as a legal right itself, thus steering the country towards sustainability.<sup>6</sup> Hence, in 1994, Law No. 19,300 on Environmental Framework Law was enacted (hereinafter LBMA or Law No. 19,300).

By the same token, in 2010, Law No. 20,417 created the Ministry of the Environment, the SEA and the Superintendence of the Environment (hereinafter, SMA). Finally, in 2012, Law No. 20,600 creating the environmental courts (hereinafter the LTA or Law No. 20,600) was enacted.

In the specific case of Chile, the key aim of this institutional development was to provide our country with serious, well developed and, above all, consistent and uniform institutions, in order to guarantee proper balance of all interests at stake in environmental matters.<sup>7</sup> This was the natural step, since not only has Chile signed international environmental agreements on this matter, but in our internal legislation, the CPR provides the right to live in a pollution-free environment.<sup>8</sup>

In this regard, environmental laws provide actions to protect the environment and the individual or collective rights of those individuals or communities affected by the decisions of administrative agencies with environmental competence. Law No. 19,300 provides several grounds to challenge environmental legal acts. This law basically provides an administrative remedy called *Reclamación* (article 20), and it provides for *locus standi* within the Environmental Impact Assessment System (hereinafter, SEIA) and citizen participation (hereinafter, PAC or citizen participation). These actions will be explained in the critical analysis in chapter four.

5 History of Law No. 20,600 of 2012, Presidential Message, p. 53: “The global effects of environmental issues, that go beyond countries’ boundaries, have led for nations to sign international agreements and conventions, in order for the acceding States to include into their internal laws –through ratification thereof– mechanisms for the protection of the environment and its components”.

6 History of Law No. 20, 600 of 2012, Presidential Message, p. 10 “Environmental protection cannot be seen as a development dilemma, but as one of its elements. When we speak of sustainable development, we are thinking about economic growth with social equity, preserving and protecting natural resources”.

7 History of Law No. 20, 600 of 2012, Presidential Message, p. 10 “Likewise, evidence shows that public powers for environmental protection and management are distributed and disseminated in multiple agencies with different ranks, which act in an inorganic, uncoordinated, parallel and ambiguous fashion as to their functions and responsibilities”.

8 History of Law No. 20, 600 of 2012, Presidential Message, p. 13 “The first objective of this draft bill is to provide a clear content and a proper legal development to the constitutional right to live in a pollution-free environment”.

The LTA also provides several actions that may be filed by stakeholders in environmental courts against environmental proceedings within the assessment process. Thus, article 17 of the LTA lists several grounds under which stakeholders are entitled to appear before the competent Environmental Court, which will be studied further in this paper.

## 2.2. Supplementary actions: *Recurso de Protección*

As we already pointed out in the previous section, there are several administrative and judicial actions to challenge the legality of environmental administrative acts. Said legal instruments must coexist with general actions in public law. This section aims to analyze how these two types of actions coexist, to subsequently conduct a detailed analysis of the *Recurso de Protección*, a typical action in Chilean constitutional law.

In regulated sectors with *special administrative rights*, which specific regulation required the creation of special standards, the rules of the ordinary administrative procedure are applied in the alternative.<sup>9</sup> Hence, there is no discussion as to the alternative application of Law No. 19,880, on framework of administrative procedures governing the acts of State Administration agencies (hereinafter, LBPA or Ley N° 19.880). It does not create legal actions, but rather regulates procedures, including some mechanisms to challenge proceedings before administration agencies.

Another problem addressed by jurists is the use of judicial actions. Both jurists and cases have discussed this matter, namely, finding the way to harmonize these special contentious proceedings with general actions in public law. In environmental conflicts, the question is whether stakeholders can freely choose between the general and alternative public law regime and the special one, or whether those actions do not apply in this regard due to the special nature of this matter, which requires special actions provided for in the environmental legislation. In this sense, Ferrada discusses “the relationship between these special processes to challenge decisions and those general processes to challenge administrative acts provided for in legislation, i.e., the “*Recurso de Protección*” and the “*Acción de Nulidad de Derecho Público*” (public law annulment).<sup>10</sup> In light of this, there are basically two theories: the first of them suggests that the special proceeding prevails, whereas the other one combines the special contentious proceeding with general legal instruments.<sup>11</sup>

9 Ley N° 19,880 of 2003, article one, first subparagraph “Administrative procedure. This law provides for and regulates the framework of the administrative procedure for the State Administration’s proceedings. Should the law provide for special administrative procedures, this law shall apply in the alternative”.

10 FERRADA (2015), p. 304.

11 As Juan Carlos Ferrada has stated, some jurists -namely Aróstica and Soto Kloss- have criticized “certain rulings of the Honorable Supreme Court that apply a principle of specialty within the procedural means to challenge acts or decisions”. See: FERRADA, BERMÚDEZ and PINILLA (2015), p. 305, footnote.

Along the same lines, this work will address the nature of the *Recurso de Protección*, a mechanism through which the Supreme Court processes a large amount of environmental cases, and thus, it is very important for the subject matter of this paper.

The *Recurso de Protección* is a legal instrument enshrined in both constitutional and administrative law, and provided for in article 20 of the CPR.<sup>12</sup> It was born in the 1970s and gained ground when democracy was restored. Today, this action is one of the most widely used to protect an extensive list of fundamental rights.<sup>13</sup> A proper definition of the *Recurso de Protección* is as follows:

A procedural action created by the Constitution, the informal and summary nature of which enables the party affected by arbitrary or illegal acts or omissions to resort directly to the relevant Court of Appeals, which shall be empowered to enact the measures it deems necessary to restore the rule of law and ensure due protection of the affected party.<sup>14</sup>

According to this definition, more than a remedy in itself, it is a genuine procedural action to which people are entitled to enforce their rights against those actions or omissions that in any way violate the protected rights. Hence, it is an urgent precautionary measure to stop the violation of rights protected by the Constitution.

As to its origin, the *Recurso de Protección* was created to expand the scope of protected rights –beyond the right to personal freedom that was already protected by the *recurso de amparo*– during the office of President Salvador Allende. Nonetheless, the collapse of democracy prevented the project from being discussed in Congress and in Senate.

This constitutional action has been essential to compensate for the lack of a general contentious proceeding and protect certain constitutional rights.<sup>15</sup> Its advantages concerning procedure –mainly the fact that it is a summary, concentrated, informal and unilateral procedure– have contributed to this. It is basically an emergency or precautionary action that the constituent has created for a swift legal reaction to breaches of constitutional rights. It is worth bearing in mind that, being an

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12 Political Constitution, article 20 “He who, due to arbitrary or illegal acts or omissions, is prevented, hindered or threatened from legitimately exercising the rights and guarantees provided for in Article 19, Numbers 1, 2, 3 fourth subparagraph, 4, 5, 6, 9 final subparagraph, 11, 12, 13, 15, 16 concerning freedom of work and the freedom to choose an occupation and to hire, and to the provisions of the fourth subparagraph, 19, 21, 22, 23, 24 and 25, shall be entitled to resort, whether by itself or on behalf of third parties, to the relevant Court of Appeals, which shall immediately adopt the measures that it deems necessary to reestablish the rule of law and assure due protection to the affected party, without prejudice to the other rights to which said party might assert before the authority or the relevant courts.

The “Recurso de Protección” shall also be admissible in the case of Number 8 of Article 19, when the right to live in a pollution-free environment has been affected by an illegal act or omission attributable to a specific authority or individual”.

13 RÍOS (2017), p. 38.

14 RÍOS (2017), p. 38.

15 NOGUEIRA (2007).

emergency procedure, “the final decision in this process does not give rise to *res judicata*, but rather to ‘*cosa juzgada formal*’ (under which a decision cannot be challenged within the same process, but it can be challenged in a different one)”. Hence, this leads to the conclusion that it is an interim solution, like all emergency solutions”.<sup>16</sup>

As mentioned above, the *Recurso de Protección* was created to protect the fundamental rights within its scope. Although this point was widely discussed at the Commission of Studies of the New Constitution in 1976, jurists and the case law soon reached consensus.<sup>17</sup> In this regard, “its legal nature is that of a specific, emergency action, with an expeditious and informal procedure... This is why it should not be used to obtain a decision on the legal merits of the case (which are to be discussed in a regular trial) since it is a precautionary action which aim is to promptly resolve factual situations...”.<sup>18</sup>

According to Enrique Navarro<sup>19</sup>, although it is enshrined in the Constitution, the *Recurso de Protección* is regulated in an *Auto Acordado* enacted by the Supreme Court in 1977, and subsequently amended in years 1992, 1998 and 2007.

The *Recurso de Protección* in environmental issues was amended in 2005, since “it modified one of the requirements for it to be applicable, replacing the requirement for the act to be “arbitrary and illegal” by “illegal act or omission”.<sup>20</sup> This amendment opened the door to more hypothesis where the constitutional right to live in a pollution-free environment is likely to be violated, since it included omissions that lead to a violation of said right.

Given the purpose of this action, it is clear that the *Recurso de Protección* was created to provide individuals with a specific, summary action against breaches of fundamental rights. Hence, under no circumstance can it be deemed as a mechanism to process matters that should be discussed in a regular proceeding. In this regard, jurists have long criticized the *recurso de protección* (as Francisco Zúñiga stated when citing Pedro Pierry), arguing, among other things, that “it acted as a substitute of the current general contentious administrative proceeding for invalidation, with no guarantees of due process, but it also led to procedures parallel to special contentious administrative proceedings”.<sup>21</sup>

The *Recurso de Protección* has led to judicial activism,<sup>22</sup> i.e., analyzing specific technical aspects of a particular matter in court, in a summary procedure lacking enough guarantees, have led some authors to be cautious regarding its scope of application, in order for this instrument protecting fundamental rights to coexist with laws and regulations specific to certain matters.

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16 RÍOS (2007), p. 44.

17 PFEFFER (2006), p. 96.

18 PFEFFER (2006), p. 97.

19 NAVARRO (2012), p. 641.

20 PFEFFER (2006), p. 96.

21 ZÚÑIGA (2015), p. 19.

22 BORDALÍ, CAZOR and FERRADA (2003), pp. 76-77

### III. CASE SELECTION

Having discussed the nature of the *Recurso de Protección*, we will now present some rulings in order to illustrate and subsequently analyze the manner in which the Supreme Court is resolving these matters. To present these cases, we will analyze the criteria used by the Supreme Court when reviewing whether an environmental administrative act can or cannot be challenged by means of a *Recurso de Protección*. For these purposes, this section will examine case studies<sup>23</sup> that clearly show the criteria used by the Supreme Court, and how they have evolved, to then understand the manner in which the Supreme Court is currently resolving these matters. This selection aims to determine whether there has been historical consistency in the Supreme Court's decisions.

#### 3.1. Evolution

##### 3.1.1 Campiche Thermoelectric Power Plant (2009)

The construction and operation of the Campiche thermoelectric power plant of the company Eléctrica Campiche S.A, which was aimed to be a coal-based power plant, underwent an environmental assessment. The project was to be located in the town with the same name, district of Puchuncaví, region of Valparaíso.

Sometime later, in the Court of Appeals of Valparaíso<sup>24</sup>, the claimants filed a *Recurso de Protección* against Exempt Resolution No. 488 of May 9<sup>th</sup> 2008 of the Regional Commission for the Environment (hereinafter, COREMA<sup>25</sup>) of Valparaíso, which granted clearance to the project. The claimants argued that this act violated their right to live in a pollution-free environment provided for in article 19 No. 8 of the CPR.

The main argument raised by the claimants was that shortly before the favorable RCA was issued, the area where the project was to be built had been qualified as “*zona de restricción primaria de riesgo para el asentamiento humano*”.<sup>26</sup> This means that land could only be used for green spaces and recreation areas.<sup>27</sup> Nevertheless, the land use restriction was removed by means of Resolution No. 112 of the Works Directorate of the Municipality of Puchuncaví, which was later declared illegal in court. Since courts determined that the aforementioned Resolution was illegal, the Court of

23 It is relevant because environmental administrative acts were challenged by means of the *Recurso de Protección*, and also due to the reasoning and decision of the Supreme Court and the media resonance.

24 *Ricardo Gonzalo Correa Dubri vs. Comisión regional del Medio Ambiente de Valparaíso* (2009), paragraph 17°.

25 The COREMAs were part of the former environmental institutions, prior to the existence of the SEA and of the Ministry of the Environment.

26 Said qualification was made by Supreme Decree No. 115 of August 5<sup>th</sup>, 1987, that modified the Inter-District Master Plan of Valparaíso and other districts. This modification was due to the fact that said geographical area is a potential flood zone because it is near an estuary.

27 Pursuant to article 61 of Decree with Force of Law No. 458 of 1975 to change land use, the relevant Regulation Plan must be amended.

Appeals upheld the *recurso de protección*, and when the owner of the project filed an appeal, the Supreme Court confirmed the appealed decision, thus invalidating the favorable RCA for the project.

As for the relevance to the subject matter of our analysis, the decision of the Supreme Court<sup>28</sup> finally confirmed the appealed decision, invalidating the RCA. This case is a milestone in environmental matters<sup>29</sup>, since the Supreme Court decided to review the environmental qualification resolutions of projects, thus leaving behind a historical record of deference to the Administration and the theory that environmental qualification resolutions by themselves cannot affect fundamental rights.<sup>30</sup>

### 3.1.2 Hidroaysén (2012)

This is perhaps the most rejected project among environmental NGOs and public opinion. This hydroelectric generation mega project consisted in the construction of five reservoirs in San Rafael lagoon and Baker river, in the region of Aysén. The companies Colbún and Endesa were the owners.

The construction of these power plants was made public at a moment where Chile feared a potential energy shortage in the coming years, and thus, the most powerful argument for the construction of these works was that by injecting energy<sup>31</sup>, Chile would not suffer from energy shortage. Nonetheless, from the very beginning, the project faced a stiff opposition from several sectors. Among other reasons, they argued that the site where the project was to be located should not be intervened, since it was a pristine and key area for the conservation of the ecosystem.

This project obtained a favorable RCA<sup>32</sup> from the COREMA of Aysén, and *Recursos de Protección* were filed against the RCA that approved the project. However, both the Court of Appeals of Puerto Montt and the Supreme Court<sup>33</sup> dismissed them. On the other hand, claims were filed with the Committee of Ministers, which were not fully resolved during the first government of Sebastián Piñera, and they were finally upheld during the second government of President Michelle Bachelet, thus invalidating the RCA that approved the project.

Regarding the subject matter of this analysis, in this project, the Supreme Court ruled on the favorable RCA, dismissing the *recursos de protección*, given that in its opinion, the Administration's proceedings were not illegal and its decisions in

28 *Ricardo Gonzalo Correa vs. Comisión Regional del Medio Ambiente de Valparaíso* (2009).

29 The decision was widely discussed due to the Supreme Court's significant change in criteria regarding the possibility to challenge a RCA by means of a *Recurso de Protección*. For a more detailed analysis, see PELLEGRINI (2009), pp. 59-78.

30 PELLEGRINI (2009), pp. 59-78.

31 The Project would have an installed capacity of 2.750 MW.

32 Exempt Resolution No. 225 (2011).

33 *Antonio Horvath K̄iss y otros vs. Comisión de Evaluación Ambiental de la Región De Aysén* (2012).



this regard were made within its discretionary powers.<sup>34</sup> Thus, in this decision, the Supreme Court was deferent to the Administration, and it insisted that a detailed analysis of the environmental file be conducted.<sup>35</sup>

### 3.1.3 Río Cuervo Hydroelectric Power Plant (2012)

*Cuervo Hydroelectric Power Plant* project consisted in the construction of a dam hydroelectric power plant in the Cuervo river, located in the region of Aysén. Energía Austral Limitada Company was the project owner.

During the environmental assessment, the SEA of the region of Aysén issued the Consolidated Assessment Report<sup>36</sup> (hereinafter, ICE). *Recursos de protección* were filed against this administrative act, and they were dismissed by the Court of Appeals of Aysén.

The claimants then appealed the decision, arguing that the ICE did not meet the substantial requirements provided for in the law, i.e., it failed to take into account the observations made during the procedure.<sup>37</sup> They also stated that the ICE only contained citizens' observations, but it failed to mention the technical observations concerning risk for the population, like those made by SERNAGEOMIN regarding the Liquiñi-Ofqui fault and the volcanic activity in the area, and thus, it omitted the recommendations of the sectoral bodies as to whether or not the project should be approved.

The Supreme Court's reasoning was based on the preventive principle<sup>38</sup>, provided for in the environmental legislation, thus concluding that the SEA of Aysén "*acted illegally when it failed to apply the law and the principles governing it*".<sup>39</sup> In the opinion of the Supreme Court, the ICE issued lacked relevant information, since it omitted the conditions set out by SERNAGEOMIN. Hence, it stated that "the ICE is illegal, since it ignored the recommendation of SERNAGEOMIN and fails to include the aforementioned land assessment report, which, in the opinion of this Court, is essential for the project to be approved or rejected by the Environmental Assessment Commission".<sup>40</sup>

34 Finally, in 2017, the owners of the project finally decided not to execute the project, arguing environmental difficulties, the number of generators and the price of energy, which finally led for the project to be economically unviable.

35 For further information on the manner in which the Supreme Court has resolved these cases through a deep analysis of the environmental record, see CORDERO (2012), pp. 359-375.

36 This Report gather procedural information before the final voting for the project by the Environmental Assessment Commission.

37 Specifically, the report by SERNAGEOMIN related to volcanic activity in the area.

38 Under the preventive principle, environmental decisions should take into account the potential future environmental effects that a specific measure or project could generate in the future. In this sense, see COSTA (2013), pp. 199-218.

39 *Corporación Fiscalía del Medio Ambiente vs. Servicio Evaluación Ambiental Región de Aysén* (2012), paragraph 7°.

40 *Corporación Fiscalía del Medio Ambiente vs. Servicio Evaluación Ambiental Región de Aysén* (2012), paragraph 9°.

This way, the Supreme Court revoked the appealed decision and upheld the *Recurso de Protección*, invalidating the ICE and ordering the owner to conduct the relevant soil study. It is worth bearing in mind that two votes were cast against this decision, by Judges Carreño and Pierry, who stated that this action should not be upheld since the ICE is an intermediate act, and thus, according to the law “*it cannot threaten constitutional rights, since, as an intermediate act, it has no effects in said regard*”.<sup>41</sup> Once again, the Supreme Court stated that intermediate acts in environmental assessment procedures can indeed affect fundamental rights, and can thus be challenged by means of the *Recurso de Protección*.

### 3.1.4 Castilla II Power Plant (2012)

The Castilla II Power Plant case<sup>42</sup> was very polemic due to the magnitude of the project and to the decision of the Supreme Court that finally revoked the favorable RCA.

As for the project’s processing, two different (but complementary projects in practice) underwent the EIA: *Puerto Castilla* project, the owner of which was Empresa OMX Operaciones Marítimas Limitada, and *Castilla Thermoelectric Power Plant* project, belonging to CGX Castilla Generación S.A. The port was to be located in the city of Copiapó, and it would be mainly destined to coal and diesel oil unloading for the future Castilla Thermoelectric Power Plant.<sup>43</sup>

Both projects received a favorable RCA,<sup>44</sup> and the *Recursos de Protección* filed against them were dismissed by the Court of Appeals of Copiapó. The claimants then filed an appeal, and the Supreme Court decided to consolidate actions, for them to be resolved in a single proceeding.

Regarding Port Castilla and the Castilla Thermoelectric Power Plant, the claimants’ main argument was the splitting of the two<sup>45</sup>, since it was in fact the same project. In light of this, the Supreme Court decided that the project had in fact been split, since –although they had different owners- they were closely related, given that neither of them would have been feasible without each other.<sup>46</sup> Finally, the Supreme

41 *Corporación Fiscalía del Medio Ambiente vs. Servicio Evaluación Ambiental Región de Aysén* (2012), dissenting vote, No. 3.

42 *Manuel Luciano Rocco Hidalgo y otros vs. Directora Regional (S) Servicio Evaluación Ambiental e Intendente (S) III Región Atacama* (2012).

43 The project would have a 30-year useful life and a US\$ 4,400,000 investment.

44 Port Castilla received a favorable qualification by means of Exempt Resolution No. 254 of December 23rd, 2010, and the Castilla Thermoelectric Power Plant through Exempt Resolution No. 46, of March 1st, 2011, both from the SEA of the region of Atacama.

45 Law No. 19,300 of 1994, Article 11 bis, first subparagraph “Bidders deliberately split their projects or activities in order to change the assessment instrument to avoid undergoing the Environmental Impact Assessment System. The Superintendence of the Environment shall be the agency called to determine whether this obligation has been breached and to notify the bidder, prior report from the Environmental Assessment Service, for the latter to undergo the system properly”.

46 *Manuel Luciano Rocco Hidalgo y otros vs. Directora Regional (S) Servicio Evaluación Ambiental e Intendente (S) III Región Atacama* (2012), paragraph 13°.

Court's argument to conclude that the project had been split was that although both projects had undergone an EIA, the connection between the port and the generation plant could not be assessed. This breached the environmental law, since, as the exact demarcation of the baseline was not clear, the environmental effects of the entire project as a whole could not be assessed. In light of this, the Supreme Court ordered that the projects should once again undergo the SEIA, but jointly, including the connection between Port Castilla and the Thermoelectric Power Plant in the baseline.

Regarding this paper's analysis on Port Castilla project, the Supreme Court revoked the decision of the Court of Appeals of Antofagasta and invalidated the favorable RCA. Likewise, in the Castilla Thermoelectric Power Plant, it confirmed the decision of the Court of Appeals of Antofagasta that invalidated the favorable RCA. Finally, the Supreme Court's instruction to the owners was that the projects should be jointly assessed, and that their connection should be evidenced. In this case, the Supreme Court rules on substantive aspects of environmental law within the framework of a *Recurso de Protección*. The underlying assumption is that splitting projects affects fundamental rights, and thus, it can be challenged by means of a *Recurso de Protección*.

### 3.1.5 Costa Laguna Real Estate Project (2014)

The *Junta de Vecinos Norte* (residents' committee) of the town of Maintencillo and other individuals filed a *Recurso de Protección* against the favorable RCA<sup>47</sup> received by this real estate project. Said action was dismissed by the Court of Appeals of Valparaíso, and the decision was then confirmed by the Supreme Court.<sup>48</sup>

The real estate project consisted in the construction of a Resort that included 304 apartments distributed in 21 buildings plus one artificial lagoon for watersports. In this case, the *Recurso de Protección* was based on the fact that the project should have undergone the SEIA by means of an EIA and not by means of a DIA, since, due to its magnitude, the project fell within the hypothesis provided for in article 11 letter b) of the LBMA, i.e., it had "significant negative effects on the number and quality of renewable natural resources, including land, air and water". In particular, the claimants argued that the project would severely affect regeneration of water, since it would depend on the fragile balance of an already depleted water table.

The Supreme Court's decision was based on the fact that the entities involved in the environmental assessment process (authorities and stakeholders) never asked that an EIA be conducted. The Court then carried out a detailed and substantive analysis of its competence, stating:

although this Court's case law has validated an in-depth substantive review of environmental qualification resolutions, including cases beyond those where they had been openly illegal (in which case the "*recurso de protección*" is clearly admissible), we cannot forget that this was

47 Environmental Qualification Resolution No. 2891-2014.

48 *Junta De Vecinos J.J.VV. Norte vs. Comisión de Evaluación Ambiental V Región* (2014).

only defensible until Ley N° 20.600 created the environmental courts, where this matter should be currently discussed due to the terms in which it has been brought.<sup>49</sup>

In light of the foregoing, the Supreme Court concluded that this matter had to be resolved in the environmental courts. It is clear that in this case, the court was deferent to the newly created environmental institutions, since it concluded that as from the enactment of the LTA, the environmental courts are those meant to process these matters, and thus, the *recurso de protección* is not the appropriate instrument to resolve this type of disputes.

### 3.1.6 El Morro III (2014)

*Recurso de Protección* were filed against the favorable RCA received by “*El Morro*” mining project, owned by SCM El Morro<sup>50</sup>, and issued by the Environmental Assessment Commission of the Region of Atacama. Said actions were mainly filed by the Diaguitas indigenous people living in the area where the project was to be located. The Court of Appeals of Antofagasta dismissed all *recursos de protección* filed, and then, upon the claimants’ appeal, the Supreme Court issued its decision on this matter.<sup>51</sup>

The claimants’ main argument was that they were not included in the Indigenous Consultation process, and thus, the guarantee of equal protection provided for in article 19 number 2 of the Constitution and in Convention No. 169 of the International Labour Organization (hereinafter, ILO), was breached.

The ruling is interesting, since it highlights the fact that pursuant to article 20 of Ley N° 19.300, certain claimants filed with the Committee of Ministers *recursos de Reclamación* against that same favorable RCA, which was still being processed at the time. The decision reads as follows: “considering its nature, said claim should be resolved in the new courts mentioned above, since it is the natural venue to resolve matters of this nature, unless urgent precautionary measures are to be adopted”.<sup>52</sup>

Subsequently, the Supreme Court analyzed whether the constitutional rights of the claimants require urgent protection in this case. For this, the Supreme Court considered the reports of the National Corporation for Indigenous Development (hereinafter, CONADI), where indigenous people were invited to participate in the consultation process, but other Diaguitas people were not informed about it. Thus, in its words “CONADI had to inform, with the proper legal grounds, whether or not other Indigenous People could be potentially affected by the project, which it failed to do”.<sup>53</sup>

49 *Junta De Vecinos J.J. VV. Norte vs. Comisión de Evaluación Ambiental V Región* (2014), para 7°.

50 Exempt Resolution No. 232 (2013).

51 *Comunidad Indígena Diaguita Yastai de Juntas de Valeriano y otros vs. Comisión de Evaluación Ambiental* (2014).

52 *Comunidad Indígena Diaguita Yastai de Juntas de Valeriano y otros vs. Comisión de Evaluación Ambiental* (2014), para 9°.

53 *Comunidad Indígena Diaguita Yastai de Juntas de Valeriano y otros vs. Comisión de Evaluación Ambiental* (2014), para 20°.

The Supreme Court finally upheld the *recursos de protección* since “illegalities in the reports... which in turn invalidate the RCA appealed in this case... raise the need for this Court to protect claimants... that were left out of the Indigenous Consultation process and those affected by the premature termination of the process”.<sup>54</sup>

It is clear that in this ruling, the Supreme Court analyzed whether or not the RCA could be challenged, and it finally decided that it could indeed be challenged. It is worth bearing in mind that the Supreme Court stated that these environmental matters must be processed in the environmental courts, and that in this case, the *Recurso de Protección* is limited to those cases requiring urgent protection when constitutional guarantees are threatened.

An interesting point in this case, while reviewing a final act such as the RCA, the Supreme Court conducted a detailed review of the technical decision of the Administration. This shows the lack of deference to the competent environmental entities. The difference between this case and what the Supreme Court had decided in previous cases (after the LTA) is the idea that the *Recurso de Protección* would only be justified if the action to be taken is urgent, and that environmental institutions are those meant to decide in those cases where environmental qualification resolutions are challenged.

As may be seen, the Supreme Court’s case law on *recursos de protección* in environmental issues has not been consistent. Initially, environmental aspects were deemed as subject to be discussed in regular proceedings, and thus, they could not be processed by means of a *Recurso de Protección*. A second stage (which includes those analyzed by Cordero<sup>55</sup>) shows a greater level of intervention from the Supreme Court in the environmental assessment procedure, who even went so far as to claim that mere proceedings can indeed affect fundamental rights. Finally, a third stage involves the creation of the environmental courts. At this stage, the Supreme Court has been kind of hesitant. Nonetheless, particularly in *Costa Laguna* and *Mina El Morro*, the idea that the *Recurso de Protección* is only admissible when fundamental rights are affected and urgent measures are to be adopted, is gaining momentum. According to this principle, all other cases should be processed by the environmental institutions created for said purpose.

In light of this, the latest case law –i.e., that of 2017– should evidence this momentum. Below, we review the most recent case law, to verify whether the Supreme Court currently has a principle that helps determine and predict those cases where it is competent to process environmental matters submitted to its decision within the framework of a *Recurso de Protección*.

54 *Comunidad Indígena Diaguíta Yastai de Juntas de Valeriano y otros vs. Comisión de Evaluación Ambiental* (2014), para 32°.

55 CORDERO (2013), p. 532.

### 3.2 Recent Case Law

The year 2017 has been particularly intense when it comes to environmental issues. For different reasons, several reforms to environmental institutions have been discussed.<sup>56</sup> Below, we analyze the main decisions issued by the Supreme Court in 2017 regarding *Recursos de Protección*.

#### 3.2.1 Penco Lirquén NLG Terminal (2017)

Octopus LNG SpA is the owner of the Penco Lirquén NLG Terminal project, consisting in the construction and operation of a marine regasification terminal in the bay of Concepción, off the coasts of Penco and Lirquén. Said project underwent an EIA in the SEA of the region of Biobío.

In this case, the challenged act was Exempt Resolution No. 214 of June 17<sup>th</sup>, 2016, issued by the Regional Director of the SEA of the region of Biobío, which prematurely ended the indigenous consultation process, and led for the project to receive a favorable RCA,<sup>57</sup> all of this while the *Recurso de Protección* was still pending. The *recurso de protección* was dismissed by the Court of Appeals of Concepción. The claimants then filed an appeal, and the Supreme Court revoked the appealed decision<sup>58</sup> and upheld the *recurso de protección*.

The claimants' main arguments were that the construction and implementation of the project would affect the access of the members of the Indigenous Association to the recollection of marine resources and to Cerro La Cata, especially those sites deemed ceremonial and sacred, thus affecting the way of life of the native people.

In light of this –in words of the claimants– the Koñintu Lafquén Mapu Indigenous Association of Penco requested that the Regional Director of the SEA opened an indigenous consultation process under the parameters of Convention No. 169 of the ILO, which started by means of Exempt Resolution No. 417 of October 30<sup>th</sup>, 2015. According to the claimants, this consultation was allegedly arbitrarily terminated by Exempt Resolution No. 214 of June 17<sup>th</sup> 2016, based on subparagraph 3 of article 14 of the LGPA, i.e., disappearance of the subject matter of the proceeding. The claimants argued that there was no discussion stage, and that only the arguments of the company owning the project and submitted in the Supplementary Addendum were taken into account.

In its arguments, the Supreme Court stated that “the delivery of an Addendum by itself does not entitle the claimant to prematurely terminate the consulta-

56 Among other matters, the existence of the Committee of Ministers has been controversial due to its decision on the Minera Dominga Project, rejected after a very short period of time provided to study the information about the Reclamación filed by the owner of the project. On the other hand, a Presidential Advisory Commission was created in 2016, in order to modify the SEIA, and during 2017, the aim was to materialize part of the proposals for matters related to the assessment procedure to be resolved before the administration, to prevent over-resorting to court in these matters.

57 Environmental Qualification Resolution No. 282 (2016).

58 *Asociación Indígena Koñintu Lafken-Mapu Penco y otros vs. Servicio de Evaluación Ambiental Región Biobío Y Comisión de Evaluación Ambiental Región Biobío* (2017).

tion process, given that the latter had already begun and that the allegedly affected Indigenous Association had already been notified<sup>59</sup>. Therefore, the Supreme Court upheld the appeal filed by the claimants, invalidating the Resolution that prematurely terminated the indigenous consultation process, and all those arising from said Resolution, including the favorable RCA.

It is worth mentioning that a vote against was cast<sup>60</sup>, on grounds that this was not the proper venue to resolve this dispute, since according to Law 20,600, certain actions can be filed in the environmental courts against the appealed Resolution, such as that of article 17 No. 8 LTA, known as *invalidación impropia*.

By way of conclusion, in this decision, an administrative act was challenged by means of a *Recurso de Protección*, which the Supreme Court finally decided to uphold invalidating said act and the succeeding ones related to it, including the RCA. Hence, in this decision, the Supreme Court conducted a detailed analysis of the environmental file, in order to determine whether or not the decision of the administration was correct.

### 3.2.2 Inclusion of Blasting as a Supplementary Method for Mechanical Extraction of Mine Tailings at Mina Invierno (2017)

This project underwent an environmental assessment by means of a DIA. The project was aimed to exploit an open-pit coal mine by mechanical extraction.

Requests for the opening of a citizen participation procedure were submitted regarding this supplementary project, which were rejected by Exempt Resolution No. 10 of January 12<sup>th</sup>, 2016, issued by the Regional Directorate of the SEA of Magallanes. Faced with this situation, the claimants filed a *recurso de reposición y jerárquico en subsidio*, which were dismissed. The claimants then filed a *Recurso de Protección* to challenge the SEA's Exempt Resolution No. 183 of February 18<sup>th</sup> 2016, which rejected the *recurso jerárquico subsidiario*. The *Recurso de Protección* was dismissed by the Court of Appeals of Magallanes, and, after an appeal was filed, the Supreme Court revoked the decision and upheld the *recurso de protección*.<sup>61</sup> While the latter was still being processed, Exempt Resolution No. 98 (RCA) of the Regional Commission for the Environmental of the region of Magallanes and Antártica Chilena of year 2016 authorized the project's development.

The claimants argued that, under article 30 bis of Ley N° 19.300, any project undergoing a DIA and causing environmental problems can be submitted to a citizen participation process, which is not limited to those projects listed in article 3 of the Regulation of the Environmental Impact Assessment System (hereinafter, RSEIA).

59 *Asociación Indígena Koñintu Lafken-Mapu Penco y otros vs. Servicio de Evaluación Ambiental Región Biobío Y Comisión de Evaluación Ambiental Región Biobío* (2017), para 8°.

60 Cast by external judge Mr. Arturo Prado.

61 *Stipitic Escauriaza María Javiera vs. Director Ejecutivo del Servicio de Evaluación Ambiental* (2017).

The Supreme Court stated that “since the project is undergoing a DIA, and hence, the SEIA, it is an activity that will involve (to a greater or lesser degree) a social benefit or purpose, which is sufficient to meet the requirement of article 30 bis of Law No. 19,300. Thus, the citizen participation process should have taken place, since the other requirements set out by the legislator were present in this case”.<sup>62</sup> Hence, the Supreme Court revoked the appealed decision, thus upholding the *Recurso de Protección* and invalidating Exempt Resolution No. 183 of February 18<sup>th</sup> of 2016, issued by the General Directorate of the SEA, which rejected the *recurso jerárquico*. It also invalidated Exempt Resolution No. 98 of July 26<sup>th</sup> 2016, issued by the Regional Commission for the Environmental of the region of Magallanes and Antártica Chilena, which granted the favorable RCA. With this, the Court ordered that the project’s processing stage be rolled back to the moment prior to the RCA, and that it should previously undergo a citizen participation process.

Said decision was agreed upon with the dissenting vote of two Judges,<sup>63</sup> who claimed that, since Law No. 20,600 was issued, the environmental courts are meant to resolve these matters. Furthermore, in this particular case, they argued that the petitioners were entitled to claim the so-called “*invalidación impropia*” under article 17 No. 8.

As may be seen, in this decision, the majority vote once again conducted a thorough analysis on the manner in which the Administration should have addressed the request for a citizen participation process, which shows the lack of deference to the powers of those entities meant to process these matters.

### 3.2.3 Los Cóndores Backup Power Plant (2017)

This project, owned by Prime Energía SpA, involves the construction and operation of a backup power generation plant of 100 MW fed with diesel oil, located in the district of Los Vilos. It is aimed to provide this power to facilities of the Central Interconnected System through the Transelec Electrical Substation.

This project’s DIA received clearance by means of Exempt Resolution No. 90 (RCA) of October 4<sup>th</sup> 2016, issued by the Environmental Assessment Commission of the SEA of the region of Coquimbo. *Recursos de Protección* were filed against said administrative act, which were dismissed by the Court of Appeals of La Serena, and this decision was later ratified by the Supreme Court.<sup>64</sup>

The claimants’ key argument was that the owners’ DIA lacked essential information on the existence of other oil-based electricity generation projects located in the construction site. Said information is relevant due to its influence on

62 *Stipicio Escauriaza María Javiera vs. Director Ejecutivo del Servicio de Evaluación Ambiental* (2017), para 14°.

63 Judge María Eugenia Sandoval and External Judge Jorge Lagos.

64 *Yáñez Veas, Wendy del Carmen vs. Comisión de Evaluación Ambiental de la Región De Coquimbo y Prime Energía SpA* (2017).



the following aspects: (i) air quality and emissions; (ii) noise; (iii) landscape; and (iv) traffic. This, since Los Vilos is about to be classified as *zona latente*.<sup>65</sup>

The Supreme Court decided that, since Ley N° 20.600 was issued, these matters must be processed by the special environmental courts created, especially considering the existence of mechanisms to challenge an RCA. The article mentions the general action to seek invalidation in environmental matters, provided for in article 17 No. 8. Thus, the Supreme Court argued that “due to its nature, the dispute submitted to this Court’s decision cannot be resolved by means of these precautionary actions, since this is not an instance where rights are declared”.<sup>66</sup> This way, the appealed decision was confirmed and the claims of the petitioners were dismissed.

The dissenting vote, cast by Judge Sergio Muñoz on the following grounds, was striking:

having assessed the information under the rules of sound judgement, a premise of which are the insights drawn from experience, and having pondered the behavior of the environmental authority regarding the project called “Bocamina II Thermoelectric Power Plant”, of the district of Coronel, which this Court has already processed, we believe it is very unlikely that the power plant owned by the company Prime Energía SpA will be monitored for actually being a backup power plant and operating the small number of hours declared. For this motive, all of its performance potential must be taken into account when undergoing the Environmental Assessment Impact System.<sup>67</sup>

By way of conclusion, in this case, the Supreme Court decided to reject the challenge. This decision is very important for the subject matter of this analysis since, unlike the other two cases of 2017, in this case, the Supreme Court’s criteria changed substantially: it stated that this was not the proper venue to process this type of conflicts, given that the environmental courts are the competent entities to process and decide on these matters.

In short, regarding the decision of the Supreme Court analyzed herein, of a total of 9 environmental administrative acts challenged by means of the *Recurso de Protección*, de Court has upheld six.

It is clear that the new environmental institutions, and especially the environmental courts, have not been recognized yet. On the contrary, by processing *Recurros de Protección*, the Supreme Court has reviewed mere administrative proceedings that (as it once stated) cannot affect fundamental rights. Although we expected for the Supreme Court’s case law to reflect the existence of the new environmental courts, the main decisions of 2017 show the opposite: that the Court is in fact reviewing the environmental file.

<sup>65</sup> Ley N° 19.300 of 1994, article 2.

<sup>66</sup> *Yáñez Véas, Wendy del Carmen vs. Comisión de Evaluación Ambiental de la Región De Coquimbo y Prime Energía SpA* (2017), para 3°.

<sup>67</sup> *Yáñez Véas, Wendy del Carmen vs. Comisión de Evaluación Ambiental de la Región De Coquimbo y Prime Energía SpA* (2017), dissenting vote, para 2°.

## IV. CRITICAL ANALYSIS

### 4.1 Deflection of the system of environmental legal actions

The rulings examined herein allow us to conduct a detailed analysis of several aspects of the manner in which the Supreme Court is deciding on environmental cases within the framework of the *Recurso de Protección*, and its effects on environmental institutions as a whole.

There is no doubt about the importance of the *Recurso de Protección* for the protection of certain fundamental rights. Without a precautionary action and a summary proceeding to enforce them, the affected parties would be unprotected, since they would lack an expeditious instrument to stop the violation of constitutional rights. Thus, according to Arturo Fermandois and Teresita Chubretovic, this action must remain alive, since it is essential for the protection of constitutional rights.<sup>68</sup> However, in practice, the *Recurso de Protección* is currently widely used against a significant number of administrative situations or acts.

In this regard, a fundamental criticism of the manner in which the *Recurso de Protección* is being used is that it actually fills the lack of a general contentious administrative procedure. However, most critical of all is that the *Recurso de Protección* is being used to process matters that require very specific and technical knowledge, for which special contentious proceedings (such as the environmental procedure) have been created. Hence, when it is not used to protect fundamental rights, said action becomes a mechanism to review the legality of administrative acts, thus distorting the function for which it was created, i.e., being an emergency protective measure.<sup>69</sup> The *Recurso de Protección* should not become a general action to challenge acts related to specially regulated matters in cases where there is not a clear violation of fundamental rights that require an urgent review (which is the nature of the *Recurso de Protección*).

Other legal systems provide other actions similar to the Chilean *Recurso de Protección* to protect fundamental rights, but unlike the practice in our country, their application is strictly alternative. In Spain, for example, remedies must first be filed with the ordinary justice, and only then can the so-called *amparo constitucional* be filed.<sup>70</sup> In Germany, the Act on the Federal Constitutional Court provides that the relevant constitutional claim has an alternative nature.<sup>71</sup>

68 FERMANDOIS and CHUBRETOVIC (2016), p. 68.

69 FERMANDOIS and CHUBRETOVIC (2016), p. 68.

70 Organic Law on the Constitutional Court of 1979 (Spain), article 43 number 1 “Violations of the aforementioned rights and liberties, arising from provisions, legal acts, omissions or mere actions by the Government or its authorities and officials, or by collegiate executive bodies of autonomous communities or its authorities, officials or agents, may be challenged by means of the “recurso de amparo” once all of the relevant remedies have been exhausted.”

71 Act on the Federal Constitutional Court, § 90, section 2 “Ist gegen die Verletzung der Rechtsweg zulässig, so kann die Verfassungsbeschwerde erst nach Erschöpfung des Rechtswegs erhoben werden. Das Bundesverfassungsgericht kann jedoch über eine vor Erschöpfung des Rechtswegs eingelegte Verfassungsbeschwerde sofort entscheiden, wenn sie

Unlike other legislations, in Chile, in absence of a general contentious administrative proceeding, the *Recurso de Protección* has been regularly used during the last years, and on the other hand, specialized courts have been created to fill the current jurisdictional gap and thus process these specific issues. In this regard, “specialized courts actually promote the constitutional right to an effective judicial protection, which our literature has called right to legal action, provided for in article 19 N° 3 of the Constitution”.<sup>72</sup>

As for environmental law as a special law, new entities have been gradually created, such as the Environmental Assessment Service, the Ministry of the Environment, the Superintendence of the Environment and finally, the environmental courts. In light of this new development, environmental matters no longer pertained to ordinary jurisdiction, but to specialized entities endowed with the knowledge required to address this type of disputes. This is why in Chile, environmental law is a separate and independent area, with specific actions, its own procedures and specialized courts. Regarding this last idea, some have claimed that “ever since Ley N° 20.600 became effective, the invalidation of environmental administrative acts must be sought in the Environmental Court, and its standards ratify the judges’ right to carry an in-depth review of the technical discretion of the acts of the environmental administration”.<sup>73</sup>

Furthermore, the environmental legislation provided both the owners of projects and the stakeholders with specific actions to enforce their rights, both at the administrative level and in court, as we already discussed in the first unit of this paper.

Regarding the specific actions mentioned in the preceding paragraph, these are provided for in both Ley N° 19.300 and in Ley N° 20.600.

Concerning the LBMA, the *Reclamación* (article 20) applies when an RCA is rejected or subject to conditions. In this case, the stakeholder is entitled to file a *Reclamación* with different authorities, depending on the modality under which the project was assessed. If it underwent assessment by means of an Environmental Impact Statement (hereinafter, DIA), it may be filed with the Executive Director of the SEA. On the other hand, in the case of an Environmental Impact Study (hereinafter, EIA), the stakeholder may resort to the Committee of Ministers.

Regarding the PAC and the projects undergoing environmental assessment by means of an EIA, article 29 of the LBMA entitles any third party to make observation within 60 days as from publication of the abstract. On the other hand, pursuant

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*von allgemeiner Bedeutung ist oder wenn dem Beschwerdeführer ein schwerer und unabwendbarer Nachteil entstünde, falls er zunächst auf den Rechtsweg verwiesen würde*” (Translation: “If the infringement is subject to legal proceedings, the constitutional claim may only be filed once all relevant legal instances have been exhausted. Nonetheless, the Federal Constitutional Court can immediately decide on a constitutional claim, even before all other legal remedies have been exhausted, in the event that it is in the public interest or that submitting the matter to the decision of the ordinary courts would seriously and unavoidably affect the claimant”).

72 FERMANDOIS and CHUBRETOVIC (2016), p. 63.

73 CORDERO (2013), p. 534.

to article 30 bis of the LBMA, when a project undergoes assessment by means of a DIA, the conduction of a 20-day citizen participation process may be instructed. In those cases where the environmental assessment procedure has involved citizen participation, if the person that made the observations believes that they were not duly pondered in the RCA, he or she is entitled to file a *Recurso de Reclamación* under article 20 of Law 19,300, mentioned in the preceding paragraph. Then, as will be discussed in the following paragraphs, the decisions of the Executive Director of the SEA or of the Committee of Ministers may be challenged before the environmental courts.<sup>74</sup>

On the other hand, since LTA became effective, several actions may be filed with the competent Environmental Court under article 17, namely: (i) *reclamación* against supreme decrees that create *normas primarias y secundarias de calidad ambiental* (which determine maximum pollutant concentrations in Chile); (ii) file a claim in order for damaged environment to be repaired; (iii) *Reclamación* against the resolutions of the SMA<sup>75</sup>; (iv) authorize the interim measures of the SMA<sup>76</sup>; (v) *Reclamación* against the decision of the Committee of Ministers or the Executive Director of SEA<sup>77</sup>; (vi) *Reclamación* against the decision of the Committee of Ministers or the Executive Director of SEA when the observations of the stakeholders of the environmental assessment process have not been taken into account<sup>78</sup>; (vii) *Reclamación* against administrative acts issued by Ministries or public services for the execution or implementation of quality, emission, prevention or decontamination standards; and (viii) *Reclamación* against the ruling on an administrative procedure for the invalidation of an environmental administrative act.<sup>79</sup>

Regarding those specific cases analyzed in this paper, and especially those occurred after the effective date of the LTA, the environmental legislation provided specific actions to challenge certain acts. In this regard, in project Costa Laguna, the *Recurso de Protección* was rejected. The manner in which the project underwent the SEIA could have been challenged in environmental courts by means of the citizen consultation process, with the subsequent filing of a *Recurso de Reclamación* under article 20 of the LBMA. In the case of project El Morro, challenged because it failed to include certain

74 Ley N° 19.300 of 1994, article 20, subparagraph 4: “The content of a substantiated resolution may be contested before the Environmental Court within 30 days as from notice”.

75 Ley N° 20.417 of 2010, article 56.

76 Ley N° 20.417 of 2010, article 48, letters c), d), and e).

77 This *reclamación* relates to the one analyzed in the case of the administrative remedy provided by Ley N° 19.300 against the RCA. It is worth mentioning that all administrative proceedings must be exhausted before this action is filed, as provided for in article 20 LBMA.

78 Articles 20 and 30 bis of Ley N° 19.300 concern the participation of third parties interested in the project, who canalize their participation by making observations, in both an EIA and a DIA. Hence, this remedy can be filed by individuals or legal entities which administrative claim (article 18 No. 5) was based on the fact that their observations were not duly taken into account.

79 It can be filed by those requesting the invalidation or by those directly affected by the environmental act (article 17 No. 8). It is worth mentioning that what is being challenged is not the administrative act itself, but the Administration’s decision on the request for invalidation. This is what doctrine has called “*invalidación ambiental o impropia*”, to distinguish it from the invalidation in Ley N° 19.880.

communities in the indigenous consultation process, the *Reclamación* of article 20 was also admissible. Filing this administrative action subsequently entitles the competent Environmental Court to process the matter by means of article 17 N° 6, Article 17 N° 8 enables those that did not participate in the citizen consultation or indigenous consultation process to resort to environmental courts by means of “*invalidación*”.

Concerning the most recent court decisions analyzed herein, the *recursos de protección* filed were admitted in both the Penco Lirquén LNG Terminal and in Mina Invierno, and, in the opinion of both minority votes, protection could also be sought by means of article 17 N° 8.

Of course, actions in this legal area must coexist with general actions, such as the *Recurso de Protección*. As indicated above, this constitutional action coexists with the legal system as a whole (although jurists have not reached consensus on whether it applies in all cases, or alternatively when there are specific actions).

The distortion of the *Recurso de Protección* has also been criticized regarding the contentious administrative proceeding, since many people and groups have resorted to this action to challenge environmental administrative decisions, failing to resort to the environmental courts. In this regard, according to Andrés Bordalí “In our opinion, courts of law (Courts of Appeals and especially the Supreme Court) are defining the country’s environmental policy”.<sup>80</sup>

Legal experts had already foreseen the situation described in the preceding paragraph when the law creating the environmental courts was issued. Hence, according to Osvaldo Urrutia, there were doubts about the manner in which the environmental courts would interact with the Supreme Court regarding those matters that could be processed by means of the *Recurso de Protección* and those that could be processed through special remedies provided for in the LTA.<sup>81</sup>

The problem with our Supreme Court’s current case law is that, when processing environmental matters by means of *recursos de protección*, its decision is not based on whether the challenged act is likely to violate the fundamental right to live in a pollution-free environment or the right to equal protection, and that said violation requires urgent protection, which, as required by the nature of the *recurso de protección*.

The Supreme Court has tended to review the processing history of a specific project and analyze whether the stages required by the procedure were legally completed, upholding the *Recurso de Protección* upon the existence of defects. Thus, in many cases, the favorable RCA of the project is invalidated. In this case, according to Luis Cordero “a key issue to explain judicial review of environmental decisions and claims for invalidation of the RCA is the intensive review of the file, including a review of the factual basis of the authority’s decisions and justifies the administrative act”.<sup>82</sup>

80 GARCÍA (2015), p. 339.

81 URRUTIA (2013), p. 501.

82 CORDERO (2013), p. 534.

The problem is that this is not the nature and purpose of the *Recurso de Protección*, since it is not the appropriate vehicle to conduct a far-reaching review of the file in order to verify whether the relevant administrative proceedings were followed, but rather to analyze if there has been a violation of fundamental rights that requires urgent protection. This poses a problem for the proper protection of the environment as a legal asset itself, because when the Supreme Court decides these matters in such a manner, it distorts and neutralizes the entire system of environmental legal actions and remedies, since by failing to act with deference to the powers of the Administration and of the environmental courts, it corrodes the legal spheres of competence. This is exacerbated by the inconsistent decisions of the Supreme Court in this regard, discussed in chapter II regarding the analyzed court decisions, which we will address below.

In light of the foregoing, the Supreme Court's inconsistent criteria as to which acts are likely to affect fundamental rights aggravates this issue, as will be discussed in the following section. This way:

The Supreme Court has not been consistent in environmental matters, and new and modern environmental institutions were created in Chile in 2010. Despite the creation of the Environmental Courts – that crowned the work of the Superintendence of the Environment and of the Committee of Ministers regarding the “reclamación”-, when processing “recursos de protección” seeking protection of the right to live in a pollution-free environment (article 19 No. 8 of the Constitution), it has not set an unambiguous criteria to determine those cases where this precautionary action can be filed and those where the matter must be discussed in special courts.

By processing environmental matters through *recursos de protección* in such a manner, the Supreme Court seems to believe that it has more constitutional powers than those it actually has, since there are some decisions in which it overlooks the administrative and judicial that our legal system has given to other entities. This behavior interferes with the principle of democracy, since there are times where other entities are meant to monitor compliance with the law. With this, we are not looking to discuss the autonomy of the judiciary, which is a desired goal in democratic regimes, but rather to focus on the problem posed when the Supreme Court's acts beyond its powers.

The manner in which the Supreme Court resolves these cases can be explained by the way in which the institutions were designed. Our law has granted powers to the Supreme Court, and it has also strengthened them, which is why the latter has often overestimated its powers and limits regarding which matters belong to its competence and which do not. In this regard, Rodrigo Correa has stated that our country has misunderstood judicial independence: “striking is the fact that, ever since the dictatorship began, the formal autonomy of the Supreme Court has been reinforced”,<sup>83</sup> and it has escalated during democracy.<sup>84</sup>

83 FERNANDOIS y CHUBRETOVIC (2016), p. 62.

84 CORREA (2005), p. 124.

The problem with the institutional design explained in the preceding paragraph is that the Supreme Court has often exercised more powers than those granted by the constituent and lawmakers. In this regard, “there are no grounds in the Constitution for claiming greater autonomy for the Supreme Court in the administration of the courts of law. This greater autonomy also interferes with the principle of democracy and in the long run, the Supreme Court would be significantly discredited”.<sup>85</sup> Based on Correa’s words, it is clear that the Supreme Court exercises powers beyond its competence, thus interfering with the principle of democracy within our institutions.

In short, our criticism here is that the judiciary often takes on powers beyond its role. In this regard, in Fernando Atria’s opinion, with the current institutional design, the Supreme Court often sees itself as chief of the judiciary, which the author calls “*organización comisarial*”.<sup>86</sup> This is a serious mistake, since the nature of the jurisdiction and its structure are different, its powers are regulated by law, and -at least under our legal system- it was created to monitor compliance with the law in specific cases, not to decide based on political considerations.

In practice, by ruling in such a manner, the Supreme Court has resolved a significant part of the country’s environmental agenda. The environment itself is a legal asset protected in Chile, which led to the creation of an organic and formal system and of the environmental legislation as a whole. Despite the fact that said legislation must be still improved to reach consensus and legitimate the manner in which Chile intends to reach sustainable development, it is the appropriate venue to resolve these matters, first at an administrative level and then in the environmental courts. The environmental courts are those legally empowered to resolve these matters.

Hence, with the unrestricted use of the *Recurso de Protección*, the Supreme Court undertakes political action, giving rise to a flawed institutional design in environmental matters. By using these actions beyond their nature, the Supreme Court participates in fields that are beyond its competence, and that belong to other entities within the environmental institutions. Thus, the Supreme Court ends up playing a political role to which it is not entitled.<sup>87</sup>

One of the reasons why the Supreme Court is resolving environmental matters in such a manner is due to its own understanding of its attributions in our legislation, exercising more powers than those provided for in the Constitution.

#### 4.2 Inconsistent criteria of the Supreme Court

Having discussed the problem of reviewing the legality and reasonableness of environmental administrative acts, we must now analyze the Supreme Court’s case law, to see whether the criteria used to review environmental matters processed within the framework of a *Recurso de Protección* has been consistent over time.

85 CORREA (2005), p. 125.

86 ATRIA (2016), p. 247.

87 GARCÍA (2015), p. 339.

Between 2009 and 2014, in four of the six cases presented herein, the Supreme Court upheld the *recursos de protección* filed and ordered the invalidation of the challenged act, three of which were favorable RCAs. Regarding the two remaining cases, in one of them, it decided that the discretionary decisions that the Administration is entitled to make within its competence had to be respected (*Hidroaysén*), and finally (*Costa Laguna Real Estate Project*) it rejected the *Recurso de Protección*, arguing that since the environmental courts were created, they are the ones meant to process these matters. Hence, it acted with deference to the special environmental courts.

In two of the three cases of 2017 analyzed above (*Terminal GNL Lirquén* and *Mina Invierno*), the Supreme Court upheld the *recursos de protección*, whereas when it was called to decide on the contestability of the favorable RCA of the *Los Cóncores Backup Power Plant*, it rejected the *recurso de protección*<sup>88</sup>, arguing that “we must bear in mind that issuance of Law No. 20,600, of June 28<sup>th</sup> 2012, which creates the Environmental Courts, they are the one meant to process the environmental disputes submitted to them”.<sup>89</sup>

In light of the analyzed decisions, we may conclude that, when deciding on these matters, the Supreme Court’s criteria have been tremendously vague and inconsistent. As we may see, when a *Recurso de Protección* is filed, the Supreme Court not only decides on matters that concern the environmental procedure (which, as we already discussed, entails several problems for the environmental institutions in general), but it also acts in a manner that is not consistent with its own case law, since it sometimes upholds the *recursos de protección* filed against environmental administrative act, whereas it rejects them other times, arguing that since Law No. 20,600 was issued, the environmental courts are the ones meant to process these matters. Problem is that if the country’s Supreme Court lacks clear, predictable and consistent criteria to resolve these matters, these essential matters end up being random, depending on how the Supreme Court decides in a specific moment. This is very detrimental for environmental institutions, which are meant to protect the environment, monitor economic activities that may potentially damage it and protect the affected communities.

As for the causes, along with the institutional design within the Supreme Court itself, we can assert that “the lack of a general or special contentious administrative proceeding in each specific area has definitely contributed to this...”.<sup>90</sup> These are two major causes of the ambivalence with which the Supreme Court resolves these matters, with no uniform criteria in this regard.

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88 With the aforementioned and questionable dissenting vote of Judge Sergio Muñoz. Judge Muñoz’s line of argument is a problem. Firstly, because legal decision cannot be based on the fact that, according to insights drawn from experience, a project will not be monitored and will thus operate at full capacity (and not as a backup power plant, as originally planned, with reduced operating hours). But more striking is the fact that the Judge claims that processing those issues in environmental courts exclusively is “detrimental”, since this is precisely the reason why they were created: creating special courts to process these highly technical issues, resorting to the *Recurso de Protección* only upon breaches of fundamental rights requiring urgent protection.

89 *Yáñez Veas, Wendy del Carmen vs. Comisión de Evaluación Ambiental de la Región De Coquimbo y Prime Energía SpA.* (2017), para 2°.

90 BORDALÍ, FERRADA and CAZOR (2013), p. 68.



Finally, a key aspect to understand the inconsistent decisions of the Supreme Court relates to the composition of the courtroom. There is no certainty about which Judges will make part of the courtroom that will process the remedy, and external judges change too, which renders the existence of a uniform case law in certain matters very difficult. This is clear in the decisions analyzed in this paper, since in some of them, minority voters claimed that reviewing technical, environmental assessment matters is not appropriate, because they are competence of the environmental courts. This hypothesis also prevails in other rulings of the same period.

Said reasons intertwine: since there is no general contentious administrative proceeding in our legal system, grounds to file a *Recurso de Protección* have expanded due to the manner in which it has been used by litigants and judges, compensating the lack of a general contentious administrative action. Nonetheless, our legal system currently has several special contentious proceedings to resolve disputes in these matters. Hence, the excessive use to solve these types of disputes should drop. This poses an organic problem within the Supreme Court itself: the manner in which courtrooms are organized regarding external judges.

The Supreme Court's aim should be to systematize and adopt clear criteria on the admissibility of a *Recurso de Protección* filed against environmental acts. Hence, the Supreme Court should not forget that the *recurso de protección* is an exceptional instrument that regulates certain fundamental rights. On the other hand, it must act with deference to administrative agencies with environmental competence and environmental courts. Thus, "when the constitutional court imposes a specific ideology in its rulings, affecting those other ideologies discussed in democracy, it not only ignores the essential differences between Politics and Law, but it also compromises the competences of the Parliament, and, thus, society's political autonomy".<sup>91</sup>

In order to reach systemic criteria in this matter (beyond the multiples guidelines that can be adopted) we must understand two essential criteria: (i) Deference to the Administration; (ii) Deference to the system of environmental legal remedies.

As for criterion (i), we must also bear in mind the respect towards the Administration. In contemporary administrative law, the Administration has broad powers to decide on certain matters. Thus, in the green light theory of administrative law, the Administration is in a better position to make decisions in certain fields.

The green light theory looks forward, to the future. This is guaranteed by setting control mechanisms, but respecting the scope of action of the Administration, refraining from carrying out an in-depth review of its discretionary powers<sup>92</sup> (which would take away some of its powers).

91 POYANGO (2013), p. 67.

92 It is worth bearing in mind that discretionary powers in general, and specifically in environmental matters, must be subject of review. Otherwise, in some cases, reviewing the Administration's actions would not be possible. This discussion has gained momentum in Spanish law. For further information in this regard, see the bibliography of Spanish authors Ramón Fernández and Luciano Parejo Alfonso.

This is even more necessary in this matter, since the *Recurso de Protección* is a summary action by means of which the Supreme Court has often questioned the legality of administrative decisions. In this regard, by reviewing environmental files, the Supreme Court is not being deferent to the Administration, which is especially serious considering that this action has no evidential stage. Thus, certain aspects of environmental assessment relate to the discretionary powers of the Administration, and hence, when reviewed by a court, the latter must respect them, since it is the Administration who has processed the project and has a better knowledge of its implications.<sup>93</sup>

As for criterion (ii), the Supreme Court must also act with deference to the powers of the environmental courts to process matters within their competence. As we mentioned when discussing how Chilean environmental law is distorted when environmental decisions are made within the framework of a *Recurso de Protección*, environmental law consists of a strong set of rules that provide it with principles, definitions, actions and remedies and with a dispute resolution venue.

Deference is important for the proper operation of the rule of law and of the legal system. Judicial deference to the Administration is essential to respect the powers each power provided by the CPR, and to respect the principle of democratic legitimacy in the solution of certain matters, since the constituent and our legal system have granted powers to those agencies with increased legitimacy to resolve certain matters. In this regard, the Administration is better legitimated to make certain decisions, since it is the branch called to satisfy public interest<sup>94</sup>, “by pursuing common interest through the action of State bodies, the latter are bound to make policies and programs...which, in order to be effective, must take into account the specific circumstances of the action and the expert knowledge available. This is why the power Public Administration has a purpose: it must act in the common interest”.<sup>95</sup> This does not mean that Public Administration is beyond the law, but rather that the lawmaker provided it with certain discretionary powers because it is in better conditions to make certain decisions”.<sup>96</sup>

Regarding the Supreme Court’s duty to act with deference to the environmental courts, this also concerns due respect and obedience to the legislative branch, who granted these special courts competence to process most environmental conflicts.

In this regard, environmental law consists of several principles and rules, enshrined in both the CPR and in environmental laws. The latter included all administrative and judicial actions to challenge administrative acts of an environmental na-

93 For further information on this matter, see: GUILOFF and SOTO (2015).

94 Ley N° 18.575 of 1986, article 3, first subparagraph, “Public Administration is at the service of people; its aim is to promote common good, continuously satisfying public needs and promoting the country’s development by exercising the powers granted to it by the Constitution and the law, and by approving, implementing and monitoring national, regional and district policies, plans, programs and actions”.

95 ATRIA (2016), p. 192.

96 GUILOFF (2014), p. 532.

ture. Thus, the lawmaker has created special mechanisms to challenge decisions, all of which are the proper vehicle to discuss the legality of the challenged acts. Finally, environmental law consists of specialized agencies, such as the environmental courts, which are the proper legal venue to resolve most of these matters. In light of this, when deciding on *recursos de protección* concerning environmental issues, the Supreme Court must be especially respectful of environmental legal actions and of the scope of actions of the environmental courts.

## V. CONCLUSIONS

The issues analyzed herein lead us to the conclusion that the manner in which the Supreme Court is deciding these matters is totally inconsistent, since the criteria to uphold or dismiss these actions vary, and they are neither constant nor predictable. The most recent case law of 2017 confirms this problem.

This diagnose is a problem for environmental institutions as a whole. When it decides environmental matters within the framework of a *Recurso de Protección*, the Supreme Court is actually playing a political role that it does not have. This, since it often decides on matters beyond those that it is entitled to decide within the framework of a *recurso de protección*, which should be processed by special administrative or environmental courts. This distorts the environmental institutions as a whole, since the Supreme Court resolves environmental matters that do not directly affect fundamental rights, applying criteria other than those provided for by special environmental laws. This is more serious considering that said criteria have neither been constant nor determined.

Through the specific actions provided for by environmental law, the environmental courts are the proper venue to decide on the legality of administrative acts of an environmental nature. This special contentious proceeding was created to hear and settle disputes between the Administration and stakeholders on the legality of environmental administrative acts. The legal venue is strictly linked to the actions created to settle these matters. When these matters are reviewed within a precautionary and emergency procedure like the *Recurso de Protección*, it is likely that they will not be evaluated optimally, due to the nature of the *recurso de protección*.

In this regard, when deciding on *recursos de protección* concerning environmental issues, the Supreme Court should set clear criteria to determine those cases where it is appropriate for it to resolve these matters. Regardless of said criteria, they should at least (i) act with deference to the Administration's powers, through agencies with competence in environmental issues; (ii) act with deference to the environmental courts' legal competence, since they are the proper legal venue to process environmental issues, in broad terms. As we mentioned above, deference is essential to comply with the principle of democratic legitimacy in decision-making, and thus, for the Supreme Court to refrain from acting beyond its competence, in breach of the powers of other agencies and of the legal system as a whole. Apart from these criteria, it is clear that other aspects of environmental institutions must be improved in order to prevent resorting to judicial proceedings that do not have an environmental nature, such as the *Recurso de Protección*.

The environmental assessment process (including all of its sub-stages) is the legal action created for the development of projects affecting the environment. Nonetheless, since environmental law is relatively recent development –and despite the amendments it has undergone- it is still deficient. Regarding competence of the environmental courts, both the grounds to resort to them and those entitled to appear before them are very limited.<sup>97</sup> Hence, reviewing the actions that can be filed with the environmental courts would be a contribution to future amendments to the environmental law, since it would promote the use of these proceedings in those cases where resorting to emergency precautionary measures is not strictly necessary.

Thus, conflicts concerning technical or procedural aspects in environmental issues should be brought before the environmental courts, which should be the general mechanism to seek legal protection, since they were created for said purpose. On the other hand, the *Recurso de Protección* should be filed in the event of potential direct breaches of fundamental rights requiring urgent protection from the State.

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97 Although the hypothesis in article 17 N° 8 LTA means that, in practice, any stakeholder can appear before it, it is actually a long procedure, which requires a prior request for invalidation.

## BIBLIOGRAPHY CITED

- ATRIA LEMAITRE, Fernando (2016). *La forma del derecho* (Marcial Pons, Ediciones Jurídicas y Sociales).
- BERMÚDEZ SOTO, Jorge (2014). *Fundamentos del Derecho Ambiental* (Editorial Ediciones universitarias de Valparaíso, 2nd ed.).
- BORDALÍ SALAMANCA, Andrés, CAZOR, ALISTE, Kamel & FERRADA, BÓRQUEZ, Juan Carlos (2003). “El Recurso de Protección como mecanismo de control jurisdiccional ordinario de los actos administrativos: una respuesta inapropiada a un problema jurídico complejo”, *Revista de derecho*, Volumen XIV, pp. 67-81.
- CORDERO VEGA, Luis (2012). “Corte Suprema y medio ambiente. ¿Por qué la Corte está revolucionando la regulación ambiental?”, *Anuario de Derecho Público UDP*, pp. 359-375.
- CORDERO VEGA, Luis (2013). “Los dilemas tras los vicios de la Resolución de Calificación Ambiental. ¿Cómo dimensionar sus efectos?”, in FERRADA, Juan Carlos (coord.). *La Nulidad de los Actos Administrativos en el Derecho chileno* (Thomson Reuters).
- CORREA GONZÁLEZ, Rodrigo (2005). “El gobierno judicial ante la Constitución”, *Revista de Estudios de la Justicia*, N° 6, pp. 117-126
- COSTA CORDELLA, Ezio (2013). “La prevención como principio del sistema de evaluación de impacto ambiental en Chile”, *Revista Justicia Ambiental*, N° 5, pp. 199-218.
- FERNANDOIS VÖHRINGER, Arturo & CHUBRETOVIC ARNAIZ, Teresita (2016). “El Recurso de Protección en asuntos ambientales: criterios para su procedencia post-institucionalidad ambiental (2010-2015)”, *Revista chilena de Derecho*, Vol. 43 N° 1, pp. 61-90.
- FERRADA BÓRQUEZ, Juan Carlos (2015). “La Justicia ambiental como justicia administrativa especializada y su articulación con los procesos administrativos generales”, in FERRADA, BÓRQUEZ, Juan Carlos, BERMÚDEZ, SOTO, Jorge & PINILLA, RODRÍGUEZ, Francisco (coords.), *La Nueva Justicia Ambiental* (Thomson Reuters).
- GARCÍA ALENZA, J.F. (2015), in BORDALÍ, SALAMANCA, Andrés, “Recurso de Protección y Reclamos ante los Tribunales Ambientales”, in FERRADA, Juan Carlos, BERMÚDEZ, SOTO, Jorge & PINILLA, RODRÍGUEZ, Francisco (coordinadores), *La Nueva Justicia Ambiental* (Thomson Reuters).
- GUILOFF TITIUN, Matías (2010). “Campiche: Es revisable la Resolución de Calificación Ambiental”, *Anuario de Derecho Público* (Universidad Diego Portales).

- GUILOFF TITIUN, Matías (2014). “Análisis costo-beneficio judicial/ Análisis costo-beneficio administrativo: Comentarios al fallo de las ciclovías en Rancagua”, *Revista de Derecho Universidad Católica del Norte*, Año 21 N° 1, pp. 523-533.
- GUILOFF TITIUN, Matías & SOTO DELGADO, Pablo (2015). “Sanciones administrativas, discrecionalidad y revisión judicial: una mirada desde la regulación responsiva”, en FERRADA, BÓRQUEZ, Juan Carlos, BERMÚDEZ, SOTO, Jorge & PINILLA, RODRÍGUEZ, Francisco (coordinadores). *La Nueva Justicia Ambiental* (Thomson Reuters).
- NAVARRO BELTRÁN, Enrique (2012). “35 años del Recurso de Protección. Notas sobre su alcance y regulación normativa”, *Estudios Constitucionales*, Año 10 N° 2, pp. 617-642.
- NOGUEIRA ALCALÁ, Humberto (2007). “El Recurso de Protección en el contexto del amparo de los derechos fundamentales latinoamericano e interamericano”, *Revista Ius Et Praxis* Año 13 N°1, pp. 75-134.
- PELLEGRINI VIAL, Julio (2010). “Caso Campiche: un importante cambio de criterio en materia ambiental”, *Sentencias Destacadas 2009*, pp. 59-78.
- PFEFFER URQUIAGA, Emilio (2006). “El Recurso de Protección y su eficacia en la tutela de derechos constitucionales en Chile”, *Estudios Constitucionales*, Año 4 N° 2, pp. 87-107.
- POYANCO BUGUEÑO, Rodrigo (2013). “Los jueces constitucionales, la política y la deferencia judicial”, *Revista Derecho Público Iberoamericano*, N° 2, pp. 67-101.
- RÍOS ÁLVAREZ, Lautaro (2007). “La Acción Constitucional de Protección en el Ordenamiento Jurídico Chileno”, *Estudios Constitucionales*, año 5, N° 2, pp. 37-60.
- URRUTIA SILVA, Osvaldo (2013). Jurisprudencia Nacional, Nuevos Tribunales Ambientales y Derecho Internacional del Medio Ambiente, *Revista de Derecho de la Pontificia Universidad Católica de Valparaíso*, N° XL, pp. 475-507.
- ZÚÑIGA URBINA, Francisco (2015). “A propósito de la “Agonía” o “Muerte” del Recurso de Protección Ambiental”, *Revista de Derecho*, N° 7, pp. 17-42.

## LEGISLATION CITED

### **Chile:**

Constitución Política de la República.

Ley Orgánica Constitucional N° 18.575 del 05 de diciembre de 1986, Bases Generales de la Administración del Estado.

Ley N° 19.300 de 09 de marzo de 1994, Bases Generales del Medio Ambiente.

Ley N° 20.417 de 26 de enero de 2010, Crea el Ministerio, el Servicio de Evaluación Ambiental y la Superintendencia del Medio Ambiente.

Ley N° 20.600 de 28 de junio de 2012, Crea los Tribunales Ambientales.

Ley N° 19.880 de 29 de mayo de 2003, Establece bases de los procedimientos administrativos que rigen los actos de los órganos de la Administración del Estado.

Ley N° 20.936 de 20 de julio de 2016, Establece nuevos sistemas de transmisión de energía eléctrica y crea un organismo coordinador independiente del sistema eléctrico nacional.

Decreto Supremo N° 116 de 05 de agosto de 1987, modifica Plan Intercomunal de Valparaíso y otras comunas.

Decreto con Fuerza de Ley N° 458 de 18 de diciembre de 1975 del Ministerio de Vivienda y Urbanismo (Ley General de Urbanismo y Construcciones).

Decreto 47 de 05 de junio de 1992 del Ministerio de Vivienda y Urbanismo, Fija nuevo texto de la Ordenanza General de la Ley General de Urbanismo y Construcciones.

Decreto 40 de 20 de octubre de 2012 del Ministerio del Medio Ambiente, Establece el Reglamento SEIA.

Biblioteca del Congreso Nacional, Historia de la Ley N° 20.600 de 28 de junio de 2012, Crea los Tribunales Ambientales.

### **Germany**

Organic Law of the Federal Constitutional Court, April 16, 1951.

### **Spain**

Ley Orgánica 2/1979, de 05 de octubre de 1979, Ley Orgánica del Tribunal Constitucional español.

## CASES CITED

- Ricardo Gonzalo Correa Dubri contra Comisión regional del Medio Ambiente de Valparaíso* (2009). Valparaíso Court of Appeals, January 8, 2009, Rol N° 317-2008.
- Ricardo Gonzalo Correa contra Comisión Regional del Medio Ambiente de Valparaíso* (2009). Supreme Court, June 22, 2009, Rol N° 1219-2009.
- Antonio Horvath Kíss y otros contra Comisión de Evaluación Ambiental de la Región De Aysén* (2012). Supreme Court, April 4, 2012, Rol N° 10220-2011.
- Corporación Fiscalía del Medio Ambiente contra Servicio Evaluación Ambiental Región de Aysén* (2012). Supreme Court, May 11, 2012, Rol N° 2463-2012.
- Manuel Luciano Rocco Hidalgo y otros contra Directora Regional (S) Servicio Evaluación Ambiental e Intendente (S) III Región Atacama* (2012). Corte Suprema, August 28, 2012, Rol N° 1960-2012.
- Junta De Vecinos Jf. VV. Norte contra Comisión de Evaluación Ambiental V Región* (2014). Supreme Court, April 29, 2014, Rol N° 2892-2014.
- Comunidad Indígena Diaguita Yastai de Juntas de Valeriano y otros contra Comisión de Evaluación Ambiental* (2014). Supreme Court, October 7, 2014, Rol N° 11299-2014.
- Asociación Indígena Koñintu Lafken-Mapu Penco y otros contra Servicio de Evaluación Ambiental Región Biobío Y Comisión de Evaluación Ambiental Región Biobío* (2017). Supreme Court, January 30, 2017, Rol N° 65349-2016.
- Stipicic Escauriaza María Javiera contra Director Ejecutivo del Servicio de Evaluación Ambiental* (2017). Supreme Court, March 16, 2017, Rol N° 55203-2016.
- Yáñez Véas, Wendy del Carmen contra Comisión de Evaluación Ambiental de la Región De Coquimbo y Prime Energía SpA.* (2017). Supreme Court, June 6, 2017, Rol N° 6121-2017.
- Maturana Crino Luis Fernando con Director Ejecutivo del Servicio de Evaluación Ambiental* (2017). Supreme Court, July 6, 2017, Rol N° 45807-2016.
- Corporación Fiscalía del Medio Ambiente con Director Ejecutivo del Servicio de Evaluación Ambiental* (2017). Supreme Court, July 25, 2017, Rol N° 31176-2016.
- Resolución N° 112 29/12/2006, Dirección de Obras de la Municipalidad de Puchuncaví.
- Resolución Exenta N° 488, 09/05/2008, COREMA of Valparaíso.
- Resolución Exenta N° 254, 23/12/2010, SEA of the Atacama region.
- Resolución Exenta N° 46, 01/03/2011, SEA of the Atacama region.



Resolución Exenta N° 225, 13/05/2011, Comisión de Evaluación Ambiental of Aysén.

Resolución Exenta N° 278, 08/10/2013, Comisión de Evaluación Ambiental of Valparaíso.

Resolución Exenta N° 232, 22/10/2013, Comisión de Evaluación Ambiental of Atacama.

Resolución Exenta N° 417, 30/10/2015, SEA of Biobío.

Resolución Exenta N° 10, 12/01/2016, Dirección Regional SEA of Magallanes.

Resolución Exenta N° 183, 18/02/2016, Dirección Regional SEA of Magallanes.

Resolución Exenta N° 214, 17/06/2016, Director Regional del Servicio de Evaluación Ambiental of Biobío.

Resolución Exenta N° 98, 26/07/2016, Comisión Regional del Medio Ambiente of Magallanes.

Resolución Exenta N° 282, 19/08/2016, Comisión de Evaluación Ambiental del SEA of Biobío.

Resolución Exenta N° 90 04/10/2016, Comisión de Evaluación Ambiental del SEA of Coquimbo.

Dictamen de Contraloría General de la República N° 59822, 17/12/2008.

