

OTHER INTERNATIONAL DEVELOPMENTS

Women's Rights to Natural Resources: A Comparative Outlook

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Even though women represent a sizeable portion of the world population engaged in agriculture, in many parts of the globe they have little access to natural resources and related assets,¹ which contributes to the "feminisation" of poverty.² Often landless in rural areas, women tend to be confined to the informal sector, providing low-cost labour in precarious conditions.

Women's rights to natural resources are shaped by a wide array of legal norms, stemming from international instruments, national legislation and customary law. Given this distinct diversity of norms ("legal pluralism"), such rights are inherently complex in nature. Their exercise is further influenced and constrained, in significant ways, by social surroundings and cultural mind-sets.

Rights to access and manage natural resources are crucial for rural women as their livelihoods too often vitally



Courtesy: UNICEF

depend upon them. Furthermore, they affect women's bargaining power and social position within their families as well as their communities.³

Gender issues, however, have progressively gained greater attention in the last few decades: various treaties have stressed the importance of women's rights, which in turn have been strengthened in a growing number of countries through general legislation (family and succession laws most notably) and sectoral laws (on natural resources, agrarian reform, etc). Yet, "[in] no region of the developing world are women equal to men in legal, social, and economic rights."⁴

This note briefly reviews some of the main legal underpinnings for women's rights to natural resources, outlining their distinctive features at global and domestic levels.⁵

International Normative Framework: Major Relevant Instruments

International instruments having a bearing on women's rights to natural resources include soft and hard law texts. Some of these cover different gender-related issues, while others pertain to the broader areas of human rights, environmental protection and sustainable development.⁶ Among these instruments, many have contributed to the shaping of domestic laws dealing with women's rights in rural settings.

A variety of soft and hard law instruments address women's rights⁷

a) Instruments related to gender issues

This category of instruments mainly embraces soft law declarations and plans of action adopted at international conferences where gender issues have been central in the debates. Illustrations of these tools include the 1994 Cairo Plan of Action on Population and Development, the 1995 Beijing Declaration and Platform for Action adopted by the Fourth World Conference on Women, and the 1996 Rome World Food Summit Declaration and Plan of Action. Some aspects of women's rights to natural resources are explicitly addressed in these documents. The Beijing Platform for Action, for example, calls for legal reforms that guarantee gender equality in access to natural resources.

Similarly, measures aimed at enhancing women's access to natural resources are laid down in the World Food Summit Plan of Action, in connection with the goal of ensuring gender equality and women's empowerment. More specifically, Objective 1.3 of the Plan of Action urges governments to "introduce and enforce gender-sensitive legislation providing women with secure and equal access to and control over productive resources, including credit, land and water".⁸ FAO's commitment to the advancement of rural women is also embodied in its Gender and Development Plan of Action 2002–07, which identifies priority actions with regard to gender equality in agriculture and rural development. These include studies on gender issues in agriculture-related legislation, particularly on women's access to land (paragraph 94).⁹

More recently, rural women's rights have been high on the agenda of the International Conference on Agrarian Reform and Rural Development (ICARRD), which took place in Porto Alegre, Brazil in March 2006. The Conference renewed commitment to agrarian reform and rural development through the identification of new challenges and options for revitalising rural communities to help achieve the MDGs of halving the number of poor

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and hungry people by 2015. ICARRD's Final Declaration emphasised that "wider, secure and sustainable access to land, water and other natural resources related to rural people's livelihoods, especially [...] women [...], is essential to hunger and poverty eradication, contributes to sustainable development and should therefore be an inherent part of national policies" (paragraph 6).¹⁰

b) Instruments on human rights

The Convention on the Elimination of all Forms of Discrimination against Women (CEDAW, 1979) is the key global treaty for the protection of women's rights. Besides prohibiting sex discrimination in broad terms (art. 2), it contains specific provisions on rural women's rights, including equal treatment in land and agrarian reform (art. 14).¹¹ The principle of non-discrimination on the ground of sex is also stated in various international instruments on human rights, including the Universal Declaration of Human Rights (UDHR, 1948), the International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966) and the International Covenant on Civil and Political Right (ICCPR, 1966).

The prohibition of discrimination against women is also prescribed in regional human rights instruments such as the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), the American Convention on Human Rights (1969), the African Charter on Human and Peoples' Rights (1981), and the Arab Charter on Human Rights (1994).

Women's right to own and administer property without discrimination is also guaranteed under the UDHR (arts 2 and 17) as well as the CEDAW (art. 15), as is their right to "equal treatment in land and agrarian reform" (CEDAW, art. 14).¹² On the other hand, the right to adequate food – the realisation of which is closely linked to the rights over natural resources – is recognised without discrimination by both the UDHR (art. 25) and the ICESCR (art. 11). Furthermore, the CEDAW implicitly provides for the protection of women's water rights through the right to adequate living conditions, which covers water supply (art. 14).

At the regional level, the Protocol on the Rights of Women in Africa (2003), adopted under the 1981 African Charter on Human and Peoples' Rights, is of particular relevance in this context. In addition to providing for women's access to land (art. 15), it calls for equality of property-related rights (arts 7 and 8), and more generally for the integration of a gender perspective in national legislation (art. 2).

c) Instruments on environment and development

Many international instruments dealing with environmental protection and sustainable development address gender issues. Among soft law tools, the 1992 Rio Declaration on Environment and Development proclaims that "women have a vital role in environmental management and development", and "their full participation is therefore essential to achieve sustainable development" (principle 20). This provision was elaborated upon in Chapter 24 of Agenda 21, which is dedicated to the gender dimensions of environment and development.¹³ In more specific

areas such as forestry, the 1992 Rio Principles on Forests call for women's participation in forest policy design and implementation, as well as in the sustainable development of forests (principles 2 and 5). Likewise, the 2002 Johannesburg Declaration on Sustainable Development contains a commitment "to ensure that women's empowerment and emancipation, and gender equality are integrated in all activities encompassed within Agenda 21, the Millennium Development Goals¹⁴ and the Johannesburg Plan of Implementation" (paragraph 20).¹⁵

Examples of hard law instruments which contain gender-sensitive provisions include, for instance, the 1992 Convention on Biological Diversity. Its preamble acknowledges the "vital role" of women in the conservation and sustainable use of biological resources, hence stressing the need for their participation in developing biodiversity policies. Similarly, the 1994 Convention to Combat Desertification provides for the promotion of women's participation in efforts aimed at combating desertification, including their involvement in national action programmes in this field (arts 5 and 10).¹⁶

International developments are echoed in national responses

Progress achieved as a result of the international efforts illustrated above was reflected, at country level, in constitutional and institutional developments where women's rights have been gradually stressed.

a) Broader constitutional recognition of women's rights

Gender equality has been enshrined in some national constitutions as far back as the first half of last century, and more widely so in recent decades. For example, sex discrimination was prohibited by the constitutions of Mexico in 1917, of Austria in 1920, of Japan in 1948, of Italy in 1948, and of India in 1949. Later on, this prohibition was introduced in many other constitutions worldwide such as those of Spain (1978), Nicaragua (1987), the Philippines (1987), Brazil (1988), Mozambique (1990), Macedonia (1991), Yemen (1991), Zambia (1991),¹⁷ Mongolia (1992), Cambodia (1993), Malawi (1994), Azerbaijan (1995), Ghana (1996), Poland (1997), Thailand (1997), Armenia (1999), Bahrain (2002) and East Timor (2002).

Since the 1990s, however, as international human rights law was gaining ground globally, more emphasis has been placed on human rights, including women's rights, in a greater number of constitutional provisions. As a result, contemporary constitutions explicitly forbid sex discrimination. Examples of these include the constitutions of Namibia (1990), of Ghana, Paraguay and Uzbekistan (1992), of Malawi and Uganda (1995), of South Africa (1996), of Burkina Faso, Fiji and Thailand (1997). Some earlier constitutions have been amended to provide for gender equality. This was the case of the 1963 Constitution of Kenya, which in 1997 included "sex" among the prohibited grounds of discrimination. As to the South African Constitution, besides proscribing discrimination on the basis of gender, it affirms that "non-sexism" is a fundamental value of the state. Beyond the intrinsic ethical merit of the principle of non-discrimination, its constitu-

tional recognition makes it easier for the courts to invalidate legal norms which discriminate against women, including with regard to the protection of nature and natural resource management.

In addition to non-discrimination provisions, national constitutions may also contain affirmative action clauses calling for special supporting measures in favour of women. Illustrations of such clauses can be found in the constitutions of India (1949), the Philippines (1987), Ghana (1992), Paraguay (1992), Uganda (1995) and Fiji (1997), and they generally form part of the state policy guiding principles. In this context, the Ghanaian Constitution directs the government to take the necessary steps for women to be fully integrated "into the mainstream of the economic development of Ghana". The 1990 Constitution of Namibia requires the enactment of legislation granting women equality of opportunities "to enable them to participate fully in all spheres of Namibian society". The Constitution of Bangladesh, as amended in 2004, states more broadly that "steps shall be taken to ensure participation of women in all spheres of national life" (Article 10, entitled "Participation of women in national life").

Furthermore, gender-specific institutions may be constitutionally mandated. In this regard, South Africa's Constitution of 1996 provides for the establishment of a Commission for Gender Equality.¹⁸ The Commission was in fact created the same year, with the mandate to investigate gender-related issues and to monitor compliance with relevant laws, policies and treaties.¹⁹

On the other hand, certain constitutions contain specific clauses regarding women's rights to natural resources. For example, Paraguay's 1992 Constitution guarantees women's participation in agrarian reform plans on equal footing with men, providing for special support measures to rural women, particularly household heads. Under Brazil's Constitution of 1988, both men and women, either individually or jointly, can be allocated property rights under the agrarian reform programme. More generally, the 1995 Constitution of Malawi grants women full legal capacity to acquire property rights.

b) Greater institutional attention to women's rights

The ECOSOC Commission on the Status of Women has been in existence for the last 60 years as the principal global body for gender policy making and standard setting. Fully dedicated to the advancement and empowerment of women, it meets yearly to evaluate progress, identify challenges and formulate policies to promote gender equality worldwide. The Commission has been instrumental in ensuring that the UN's work incorporates a gender perspective, and in expanding the recognition of women's rights.²⁰

Progress made internationally in respect of women's rights has had a number of positive institutional repercussions in many national jurisdictions. On the policy side, to follow up on the Beijing Platform for Action of the Fourth World Conference on Women, countries have designed their own action plans and created some institutional machinery to improve gender equality and promote the advancement of women. For instance, in 1998 the Fiji

Women's Plan of Action 1998–2008 was approved and an Inter-Ministerial Committee on Women was established to oversee and coordinate its implementation.

Another illustration of such institutional developments can be found in India, where a National Commission for Women was set up in 1992 and a National Policy for the Empowerment of Women was adopted in 2001. Other examples include that of Burkina Faso, where a Ministry for the Advancement of Women was put in place in 1997, and a National Policy on the Advancement of Women was approved in 2004. Likewise, Brazil has a National Council for Women's Rights, Nicaragua has an Inter-institutional Committee for Women and Rural Development, and Tunisia has a National Council on Women and the Family.²¹ Kenya has adopted a National Gender and Development Policy in 2000, and Mexico has developed a National Programme for Women 1995–2000 called "Alliance for Equality".²²

Human rights commissions and other independent authorities, including gender-specific institutions, may also be instrumental in advancing women's rights. For example, South Africa's Commission on Gender Equality has the authority to investigate violations of women's rights and may resolve disputes by negotiation, mediation or conciliation. In Ghana, the Commission on Human Rights and Administrative Justice has been effective in protecting women's land rights within family disputes, partly thanks to its greater accessibility, geographically and financially, than the normal court system.²³

National Legal Systems: Some Key Trends

Women's rights to natural resources are determined by various branches of law, including property, family, succession and natural resource law. In this note, only the latter area is covered.²⁴ While women's rights to natural resources are of paramount importance in rural areas, in fact they are often curtailed by a combination of factors. Whereas most laws dealing with natural resources are drafted in gender-neutral terms, either their practical implementation or their interaction with other social norms frequently lead to inequitable results. This is why, in practice, rural women rarely fully enjoy independent rights to natural resources in many regions of the world. However, in an attempt to reverse this trend, legislative efforts made in the recent past to boost women's rights have yielded some positive outcomes, particularly in respect of their rights to land resources, and to a lesser extent their rights to other natural resources such as fish, forests and water.

Women's rights to land resources

Land legislation and agrarian reform laws have long ignored or neglected gender issues. Under early agrarian reform programmes, women's rights received little attention, if any. In India, for instance, land tenancy reforms and land redistribution programmes have predominantly benefited male household heads. Latin American agrarian reforms, too, have initially targeted household heads, and thus mostly men. Some agrarian reform laws have even explicitly discriminated against women, as in Mexico, where up to 1971 women were eligible for the reform pro-

gramme only if heads of households. As a result, only a small proportion of women had effectively taken advantage of land redistribution programmes.²⁵

Since the 1990s, however, law-makers have increasingly paid attention to gender equity in land resource management. This was achieved through various legal reforms, which included changes to agrarian and land laws notably for: adhering to the principle of non-discrimination; assuming joint ownership of family land; providing for joint land titling for couples (either married or in union); prohibiting land sales without consent of both spouses; ensuring women's fair representation in land management bodies; outlawing inadequate customary norms.²⁶

Examples of legal texts that recognise equal land rights for men and women include: (i) the Philippines Comprehensive Agrarian Reform Law of 1988, which gives women rural labourers equal rights to own land;²⁷ (ii) Mexico's 1992 Agrarian Act, which grants equal rights to male and female *ejido* members;²⁸ (iii) Niger's Rural Code of 1993, which confers on citizens the right to access land resources without distinction based on gender; (iv) Eritrea's Land Proclamation of 1994, which embraces the principle of non-discrimination in land rights; (v) Bolivia's National Service for Agrarian Reform Act of 1996, which states that land distribution, administration, tenure and exploitation for women must be based on "equity criteria"; (vi) Burkina Faso's Agrarian and Land Act of 1996, which re-affirms the principle of allocation of state-owned land without sex discrimination; (vii) Ethiopia's Federal Rural Land Proclamation of 1997, which grants women equal rights in respect of the use, administration, control and transfer of land; (viii) Mozambique's Land Act of 1997, which gives equal rights to men and women in state-owned land;²⁹ (ix) Nicaragua's Urban and Agrarian Property Act of 1997, which recognises equal access to land rights for men and women; (x) Tanzania's Land Act of 1999, which provides for men's and women's equal rights to hold and deal with land; (xi) South Africa's Promotion of Equality and Prevention of Discrimination Act of 2000, which prohibits unfair limitation of women's rights to access land.³⁰

With regard to legislative developments concerning "family tenure", under the 1999 Land Act of Tanzania, there is a presumption of spousal co-ownership of the family's land.³¹ As a consequence, "consent of both spouses is required to mortgage the matrimonial home, and in case of borrower default, the lender must serve a notice on the borrower's spouse before selling mortgaged land."³² A similar provision is found in the 1988 Philippines Comprehensive Agrarian Reform Law, which requires the consent of both spouses for land sales and mortgages.³³ According to the 1997 Urban and Agrarian Property Act of Nicaragua, land titles issued to family heads under the agrarian reform must include the spouse too, as well as companions in stable *de facto* unions. This has actually led to the recognition of land rights to a large number of women involved in unions which do not fall under the legal definition of marriage, and who had been in the past excluded from previous land titling programmes.³⁴ Similarly, Brazil's Agrarian Act of 1993 provides for alloca-

tion of land titles to men and women alike, either individually or as joint owners, but in actual fact joint registration remains quite rare and only a limited percentage of land reform beneficiaries are women.³⁵ In Honduras, under the 1991 and 1992 Decrees on Modernization and Development of the Agricultural Sector, agrarian reform land can be allocated equally to men and women, and joint titling is allowed upon request.³⁶

As part of the measures aimed at improving gender equity in the membership of land management bodies, Uganda's Land Act of 1998 has made specific provisions to ensure adequate representation of women not only at the national level in the Uganda Land Commission, but also at lower levels in Land District Boards and in parish-level Land Committees.³⁷ Likewise, Tanzania's Land Act of 1999 provides for "fair balance" of men and women in the appointment of the National Land Advisory Council. Under South Africa's National Environmental Management Act of 1998, the members of the National Environmental Advisory Forum – which may deal with matters regarding the management of natural resources – must be appointed taking into account the desirability of women's representation. Also in the Philippines, in accordance with the Comprehensive Agrarian Reform Law of 1988, women rural labourers enjoy equal rights to participate in relevant advisory and decision-making bodies.

In assessing legal advances achieved in this area, a recent study found that, although significant attempts have been made to improve land rights for women, land reform programmes continue to undervalue the negative impacts of gender-asymmetric land policies, and institutional arrangements for land tenure tend to maintain existing gender inequities. Hence the need to revisit existing mechanisms to ensure that "women's equal rights are effectively incorporated into land policy and tenure programmes."³⁸ Moreover, in practice women are often constrained in obtaining and exercising their rights to land in many ways, with patriarchal values and behaviour being among the most persistent root obstacles "to improving gender equity in land rights".³⁹

Women's rights to other natural resources

While women's land rights have gained ground in recent decades through new or revised agrarian and land laws in a number of countries across the world, their rights to fish, forest, water and other natural resources have not received the same degree of attention in national legislation. In fact, beyond land laws, gender is still rarely referred to in explicit terms under the laws dealing with the management of natural resources. However, there are some exceptions to this, which can be illustrated by a few examples of gender-specific legal provisions in the areas of fisheries, forestry and water resources management.

a) Women's rights in the area of fisheries

So far legislators have not been very active in promoting women's rights in this sector, although it is well established that sustainable use of fisheries and improvements in their productivity "can be achieved if women's crucial role is acknowledged."⁴⁰ However, some legal

efforts have been made in this area. In the Philippines, for example, there is a traditional gender division of labour whereby women are mainly involved in shallow water fishing and fish marketing, whereas men are usually engaged in deep waters from boats.⁴¹ Support for women fishers, through appropriate technology, research and financial measures, adequate production, construction of post-harvest facilities, marketing assistance and other services, is one of the policy directions of the 1998 Fisheries Code (sec. 2). Women's involvement in community fisheries is encouraged by the Bureau of Fisheries and Aquatic Resources (sec. 65), and women fishers must be represented in such bodies as the Municipal Fisheries and Aquatic Resources Management Councils (sec. 75) and the Integrated Fisheries and Aquatic Resources Management Councils (sec. 78).

In Fiji, fisheries represent a key sector of the national economy and are socially important. Under the Fisheries Act (as last amended in 1999), only licence holders can fish in Fijian waters (sec. 5). However, fishing licences are not required in waters where customary fishing rights are recognised in favour of local communities (sec. 13), and for the administration of which a Native Fisheries Commission is appointed (secs 14–20). While the Fisheries Act is apparently gender neutral, in practice there is a “widespread gender division of labour, whereby men fish in deep water from boats and canoes, and women harvest the reefs, shores and swamps and clean and market fish caught by men.”⁴² And although activities for the empowerment of women fishers are performed by some non-governmental organisations like Women in Fisheries Network, women's participation in fisheries management remains modest. To encourage greater involvement of women fishers, policy instruments adopted after the 1995 Beijing Conference “envisage assistance for women in traditional fisheries communities”, as well as “consideration for women's traditional resource use needs within environmental impact assessment”.⁴³

b) Women's rights in the forestry sector

Although the 1992 Rio Principles on Forests clearly called for women's involvement in forestry some 15 years ago,⁴⁴ to date gender concerns have hardly been addressed in forest laws in significant ways. However, some recent legal texts have devoted a few provisions to gender issues, which mainly address institutional aspects.⁴⁵ Under the 2005 Forests Act of Kenya, for instance, the members of the Forests Board must be appointed taking into account the principle of “gender representation” (sec. 6). Likewise, in Liberia's National Forestry Reform Law of 2006, there is provision for women's interests to be “fairly represented” in making appointments to the Forestry Management Advisory Committee (sec. 4).

Under Vanuatu's Forestry Act of 2001, the National

Council of Women, among other advisory bodies, must be consulted during the development process of the Forestry Sector Plan (sec. 11). In Lithuania, the 2002 Regulation on the national forestry policy and its implementation strategy provides for the promotion of women's employment in the sector with a view to satisfying forest-related social needs (sec. 11). In Zambia, participatory forest management approaches, based on “equitable gender participation”, must be devised and implemented by the Forestry Commission under the Forests Act of 1999 (sec. 5).

c) Women's rights to water resources

In this area, South Africa offers a good example of a gender-sensitive national water policy. Based on the Commission for Gender Equality's finding that there was *de facto* sex discrimination in respect of water rights,⁴⁶ the National Water Act of 1998 significantly changed the water

legal regime, placing fresh water resources under the trusteeship of the state, with the objective of ensuring the protection of, and fair access to, water resources. The Act specifically aims to promote “equitable access to water” in order to remedy the effects of past gender discrimination, and to guarantee “appropriate” gender representation in relevant bodies (sec. 2). Under the same Act, account must be taken of the need “to redress the results of past [...] gender discrimination”, particularly for the issuance of licences (sec. 27), the provision of financial assistance (sec. 61), and the performance of

the functions of the catchment management agencies (sec. 79). Moreover, in appointing the members of the governing board of catchment management agencies, the responsible minister may hire additional members to achieve “sufficient” gender representation (sec. 81).

In some countries, gender-related provisions can also be found under legislation dealing with the management of irrigation infrastructure by water users. One illustration of this is the 2000 Irrigation Regulation of Nepal, which requires that executive committees of water users' associations include at least two women out of nine members. In practice, however, women's participation in water users' associations remains very limited.⁴⁷ Another example is that of Mali's 1996 decree regulating access to irrigated plots in the *Office du Niger* scheme, which clearly prohibits discrimination between men and women. In recent years, women's access to irrigated plots has been encouraged on the ground through a number of irrigation projects which put greater emphasis on gender issues. For instance, under a project in the Gambia, 90% of the beneficiaries were women. Under another project in Senegal, part of the irrigated land was allocated to the village women's association.⁴⁸



Courtesy: FAO

In recent decades, gender issues have been prominent in the international arena. Women's rights have progressively received greater recognition in policy fora as well as through soft and hard law tools. Wide-ranging gender policy directives have been enshrined in the Beijing Platform for Action, and women's rights to natural resources have been more visibly acknowledged in international instruments dealing with human rights, environmental protection and sustainable development. In the light of such progress, it is argued that gender inequality "is increasingly recognized as a human rights violation."⁴⁹ A similar evolution was witnessed at the national level in most regions of the world, where policy, institutional and legal measures have been put forward to eradicate gender discrimination and strengthen women's rights to natural resources, particularly as regards access to and control of land assets. Consequently, rural women's legal entitlements have been meaningfully improved in statutory law through various legislative reform processes in a large number of countries.

Efforts made by legislators worldwide to advance women's natural resource rights have not, however, produced results on the ground as extensively as desired. Although formally enacted, non-discriminatory legislation on natural resources is yet to be entirely enforced. Even where gender-sensitive laws are in place, women often face profound constraints in acquiring secure rights to land and other natural resources.⁵⁰ In fact, deeply rooted factors in societies tend to perpetuate entrenched inequalities, which continue to hinder the implementation of suitably gendered legal texts in many ways. While the adoption of laws establishing gender equality is necessary, it is not sufficient *per se* because their application "depends on political, institutional and social factors that vary considerably from one continent to another."⁵¹ The broad range of widespread reasons for poor enforcement of pro-women statutory provisions includes persistent inadequate customary norms⁵² and limited representation of women in key policy-making structures,⁵³ in addition to insufficient budget allocations and the lack of other supporting measures.⁵⁴

As legal change can only be achieved through social change, gender equity cannot be attained "in isolation from broader efforts to strengthen social justice, democratic development, political participation of the poor and environmental sustainability."⁵⁵ This notwithstanding, it is essential that any existing legal impediments to the complete exercise of women's rights to natural resources are identified and removed, and that more gender-focused norms continue to be conceptualised, adopted and implemented for the further advancement of women's legal status.⁵⁶

Notes

1 A UN study found that although women make up the majority of small farmers "in countries around the world, they continue to be denied the right to own the ground that they cultivate and on which they raise their families" (UNIFEM, *Women's Land and Property Rights in Situations of Conflict and Reconstruction*, New York, 2001, p. 6).

2 With higher rates of unemployment than men, women "constitute the majority of the world's 1.3 billion absolute poor" according to UN, *Gender equality beyond 2005: building a more secure future*, International Women's Day 2005. In the same vein, another study notes that attaining land rights for women means "gains in the struggle against poverty, since poverty is so closely associated with women's unequal access to land. To improve gender-inclusive access to land, and

the benefits from land, may be one way to overcome economic and social disadvantages, especially in rural areas." (FAO, *Gender and land compendium of country studies*, Rome, 2005, p. 26). F. Derrien, "Enhancing the specific needs of women farmers in agricultural policies", *World Farmer*, January 2004, "Special Issue: Women Farmers", similarly notes: "The majority of the world's poor live in rural areas. Most of them are women, and agriculture is their main source of income" (p. 6).

3 In this regard, the following is observed in WEDO, *Common Ground—Women's Access to Natural Resources and the United Nations Millennium Development Goals*, New York, 2003, p. 3: "Women's survival, and that of their households and communities, depends on access to and control of natural resources—land, water, forests and plants. Every day women and girls walk long distances to bring water and fuel to their families. Women perform the majority of the world's agricultural work, producing food for their families, as well as other goods that are sold in national and international markets. Over generations, women have developed in-depth knowledge of the uses and care of medicinal plants. Women have learned to manage these resources in order to preserve them for future generations. Yet, women's access to and control of these resources is far from guaranteed." E. Crowley, *Women's right to land and natural resources: Some implications for a human rights-based approach*, FAO, 1999 (www.fao.org/SD/LTdirect/LTAn0025.htm) similarly notes that women's right to land "is a critical factor in social status, economic well being, and empowerment. Land is a basic source of employment, the key agricultural input, and a major determinant of a farmer's access to other productive resources and services. But land is also a social asset, crucial for cultural identity, political power, and participation in local decision-making processes."

4 World Bank, *Gender Equality and the Millennium Development Goals*, Washington, 2003, p. 4.

5 The main information sources used for this note include: (i) FAO, *Gender and law—Women's rights in agriculture*, by L. Cotula, Legislative Study 76 Rev.1, Rome, 2006; (ii) FAO, *Law and sustainable development since Rio—Legal trends in agriculture and natural resource management*, FAO Legal Office, Legislative Study 73, Rome, 2002.

6 Labour law instruments—not covered here—are also pertinent to the rights of women agricultural workers. For instance, the 1998 ILO Declaration on the Fundamental Principles and Rights at Work embodies the principles of elimination of discrimination in employment and occupation, including sex discrimination.

7 For an in-depth history of women-related "international diplomacy" since the League of Nations, see H. Pietilä, *The Unfinished Story of Women and the United Nations*, United Nations Non-Governmental Liaison Service, New York-Geneva, 2007.

8 The Declaration adopted in 2002 at the Rome World Food Summit; *five years later* reaffirmed the need "to remove obstacles faced by women, who represent the majority of small-scale farmers and yet are often denied access to essential resources like land and water, have less decision-making power and fewer opportunities for obtaining credit."

9 FAO *Gender and Development Plan of Action (2002-2007)*, Rome, C 2001/9, 2001. The Plan of Action has four objectives: (i) promote gender equality in the access to sufficient, safe and nutritionally adequate food; (ii) promote gender equality in the access to, control over and management of natural resources, and agricultural support services; (iii) promote gender equality in policy-making and decision-making processes at all levels in the agricultural and rural sector; and (iv) promote gender equality in opportunities for on-farm and off-farm employment in rural areas.

10 Gender issues have also been recently discussed within the UN reform process. As part of this debate, a paper entitled *Gender Equality Architecture and UN Reforms* outlined the successes and failures of the current UN system in addressing gender equality and women's rights, and put forth reform proposals in this regard. See the paper in H. Pietilä, *The Unfinished Story of Women and the United Nations*, *op. cit.*, Annex II.

11 FAO, *Convention on the Elimination of all forms of Discrimination against Women (CEDAW)—Guidelines for reporting on Article 14*, Rome, 2005. See also a study by FAO, IFAD and ILC (*Rural Women's Access to Land and Property in Selected Countries—Progress Towards Achieving the Aims of the Convention on the Elimination of all Forms of Discrimination against Women*, Rome, 2004), which analyses information on the status of rural women provided in selected country reports submitted by parties to CEDAW between 1997 and 2003. It should be noted that the CEDAW Committee is the human rights treaty body that has given the most extensive attention to women's land rights, as illustrated by I. Ikdhah *et al.* in *Human rights, formalisation and women's land rights in southern and eastern Africa*, Studies in Women's Law No. 57, Institute of Women's Law, University of Oslo, 2005.

12 Among pertinent soft law instruments of interest in this area, Resolution 15 (1998) of the Sub-Commission on the Promotion and Protection of Human Rights prohibits discrimination against women in acquiring and securing land, and urges countries to repeal discriminatory rules in this regard.

13 Under Chapter 24.3-f, governments are specifically requested to support and strengthen "equal access to land and other natural resources". Chapter 14.17-b of Agenda 21 (*Promoting sustainable agriculture and rural development*) also stresses the need for women to have access to land, water and forest resources.

- 14 Significantly, MDG 3 is entitled *Promote gender equality and empower women*. On gender, natural resources and the MDGs, see: WEDO, *Common Ground – Women's Access to Natural Resources and the United Nations Millennium Development Goals*, New York, 2003; World Bank, *Gender Equality and the Millennium Development Goals*, Washington, 2003.
- 15 Similar measures are contemplated in the Johannesburg Plan of Implementation. For example, paragraph 6-d calls for the following: "Promote women's equal access to and full participation, on the basis of equality with men, in decision-making at all levels, mainstreaming gender perspectives in all policies and strategies, eliminating all forms of violence and discrimination against women, and improving the status, health and economic welfare of women and girls through full and equal access to economic opportunity, land, credit, education and health-care services".
- 16 Y. Lambrou and R. Laub, *Gender Perspectives on the Conventions on Biodiversity, Climate Change and Desertification*, FAO, Rome, 2004, provides a gender-sensitive outlook on the three conventions. See also: W. R. W'O Okot-Uma and R.R. Odiachi, *Biodiversity and Gender for Sustainable Development*, Commonwealth Secretariat, London, 1999; IFAD, *Gender and desertification – Expanding roles for women to restore drylands*, Rome, 2006.
- 17 Interestingly from a gender standpoint, Zambia's Constitution states: "In this Constitution, unless the context otherwise requires, words and expressions importing the masculine gender include females" (Article 133-13).
- 18 In addition, South Africa's Promotion of Equality and Prevention of Unfair Discrimination Act 2000 forbids sex discrimination, including in land rights, providing for a duty of the state to eliminate unfair discrimination through the auditing and amendment of laws and policies.
- 19 By the Commission on Gender Equality Act 1996.
- 20 See the Commission's website at www.un.org/womenwatch/daw/csw.
- 21 K. Mellouli, *Law, Gender and Irrigation Water Management*, Master's Thesis, Faculté des Sciences Juridiques Politiques et Sociales, Tunis, 2004.
- 22 FAO, *Gender and law – Women's rights in agriculture*, op. cit., pp. 14–16; FAO, *Gender and land compendium of country studies*, op. cit., p. 88.
- 23 FAO, *Gender and law – Women's rights in agriculture*, op. cit., p. 265.
- 24 For a broader review of the relevant legal framework, see FAO, *Gender and law – Women's rights in agriculture*, op. cit.
- 25 FAO, *Law and sustainable development since Rio – Legal trends in agriculture and natural resource management*, op. cit., p. 254.
- 26 FAO, *Improving gender equity in access to land*, FAO Land Tenure Note 2, Rome, 2006 addresses gender relations and how their structure affects access to land, presenting strategies to improve gender equity in land rights. See also in this regard: FAO, *Gender and access to land*, FAO Land Tenure Studies 4, Rome, 2002.
- 27 The 1992 Women in Development and Nation Building Act also provides for women's right to "equal treatment in agrarian reform and land resettlement programmes". Implementing guidelines have been adopted by a Memorandum Circular of 1996 and an Administrative Order of 2001, under which no sex discrimination can be made in beneficiary selection, and land titles must be issued in the name of both spouses when they jointly cultivate common tillage.
- 28 *Ejidos* are lands allocated through expropriation and redistribution. In practice, however, only a small number of *ejido* members are women.
- 29 On Mozambique's Land Act of 1997, see C. Tanner, *Law Making in an African Context: The 1997 Mozambican Land Law*, FAO, Legal Paper Online 26, 2002.
- 30 Under a specific Land Reform Gender Policy adopted by South Africa in 1997, legislation must be formulated in non-discriminatory terms. For instance, right holders must be referred to as "he or she", as in the 1997 Extension of Security of Tenure Act.
- 31 L.A. Wily, *Making Progress – Slowly: New Attention to Women's Rights in Natural Resource Law Reform in Africa*, Presentation to the Regional Conference on the Legal Rights of Women in Agricultural Production, Kampala, Uganda, 2001 (www.oxfam.org.uk/what_we_do/issues/livelihoods/landrights/downloads/slowprogrtf.rtf) notes in this regard: "The law presumes that unless the certificate explicitly states that only one spouse is owner, then both or all spouses will be registered as joint occupiers. Even when the land is in the name of one spouse only, if the other spouse or spouses contribute by their labour to the productivity and upkeep of the land, they shall be deemed to be joint occupiers".
- 32 FAO, *Gender and law – Women's rights in agriculture*, op. cit., p. 252.
- 33 In addition, an Administrative Order of 1996 provides that both spouses must sign contracts concluded with persons occupying forest lands.
- 34 As a result of this broader legal basis for joint titling, the number of women with legal rights to land has dramatically increased, from 10% in the 1980s to 42% between 1997 and 2000 (FAO, *Gender and land compendium of country studies*, op. cit., p. 96).
- 35 L.L. Barsted, *Genero e legislação rural no Brasil: A situação legal das mulheres face a reforma agrária – Relatório Final*, INCRA/FAO, Brasília/Roma, 2002.
- 36 In this respect, "the need for equal opportunities for men and women in the access to land and titling" was recently stressed once again by ICARRD participants (*Report of the international conference on agrarian reform and rural development*, Porto Alegre, Brazil, 7–10 March 2006, C 2006/REP, FAO, Rome, paragraph 34).
- 37 Uganda Land Alliance and Action Aid International Uganda, *Biting the feeding hand – Women's voices on land*, ICARRD, Porto Alegre, 2006.
- 38 FAO, *Gender and land compendium of country studies*, op. cit., p. viii.
- 39 *Ibid.*, p. 106.
- 40 FAO, *Gender and food security – Fisheries* (www.fao.org/Gender/en/fish-e.htm).
- 41 FAO, *Gender and law – Women's rights in agriculture*, op. cit., p. 66.
- 42 *Ibid.*, p. 70.
- 43 *Ibid.*
- 44 Under the *Non-Legally Binding Authoritative Statement of Principles on Forests*, women's participation in forestry is called for in two provisions, namely: (i) Principle 2-d, which states: "Governments should promote and provide opportunities for the participation of [...] women in the development, implementation and planning of national forest policies."; and (ii) Principle 5-2, which provides: "The full participation of women in all aspects of the management, conservation and sustainable development of forests should be actively promoted."
- 45 Forest policies, on the other hand, now tend to deal more frequently with gender matters. For example, under the 1998 National Forestry Policy of Tanzania, private and community forestry activities must be "designed in a gender sensitive manner", and "clearly defined forestland and tree tenure rights" must be instituted for "both men and women" (L.A. Wily, *Making Progress – Slowly: New Attention to Women's Rights in Natural Resource Law Reform in Africa*, op. cit.).
- 46 In this connection, the Commission stated: "rights to water are intrinsically linked to land rights. Therefore control, access and quality of water inequitably reside with those enjoying riparian rights and land ownership. This means that rural women, who historically do not own land and whose traditional duty is to ensure that the household is supplied with water, bear the burden of having to travel long distances carrying heavy loads of water" (FAO, *Gender and law – Women's rights in agriculture*, op. cit., p. 51).
- 47 However, field studies have shown that, due to social practices reserving decision-making to men, membership of water users' associations is normally restricted to one member per household, typically the male household head (FAO, *Gender and law – Women's rights in agriculture*, op. cit., p. 57). This tendency was also illustrated in Tunisia by K. Mellouli, *Law, Gender and Irrigation Water Management*, op. cit.
- 48 L. Cotula et al., *Land and water rights in the Sahel – Tenure challenges of improving access to water for agriculture*, FAO, Livelihood Support Programme, LSP Working Paper 25, Rome, 2006, p. 21.
- 49 UN, *Gender Equality beyond 2005: Building a More Secure Future*, International Women's Day 2005, op. cit.
- 50 S. Lastarria-Cornhiel, *Integrating Gender in Land Tenure Programmes: Findings and Lessons from Country Case Studies*, FAO, Rome, 2002.
- 51 F. Derrien, "Enhancing the specific needs of women farmers in agricultural policies", *World Farmer*, January 2004, "Special Issue: Women Farmers", p. 6.
- 52 While existing customary tenure systems often "contain norms and practices that are gender discriminatory", they tend to become more individualised and so "women's tenure status is becoming more insecure" (L. Cotula [ed.], *Changes in "customary" land tenure systems in Africa*, IIED/FAO, London/Rome, 2007, pp. 6 and 63). In the case of Kenya, for instance, a recent study found that past "practices permeate contemporary customs that deprive women of property rights and silence them when those rights are infringed" ("Double Standards: Women's Property Rights Violations in Kenya", *Human Rights Watch*, Vol. 15, No. 5 (A), March 2003, p. 2).
- 53 Too often rural women's participation in elected political bodies is very weak, and they are barely heard – if not voiceless – in most of the institutions responsible for rural development, agrarian reform and natural resource management.
- 54 D. Elson, *Budgeting for Women's Rights – Monitoring Government Budgets for Compliance with CEDAW*, UNIFEM, New York, 2006; see also FAO, *Breaking ground: present and future perspectives for rural women in agriculture*, Rome, 2005.
- 55 J. Quan, *Land access in the 21st century: issues, trends, linkages and policy options*, Rome, FAO, 2005, p. 32.
- 56 In this regard, it is observed in FAO, *Gender and law – Women's rights in agriculture*, op. cit., that "even where a constitution, a law or other legal instruments are not fully implemented, their adoption is not in vain. The very fact that a constitution or a law is discussed and passed by a constituent assembly or a parliament, and that certain principles and values are enshrined in the 'social contract' governing society, may contribute to the long-term process of social and cultural change" (p. 167). ICARRD's Final Declaration of 2006 stressed in this connection "that laws should be designed and revised to ensure that rural women are accorded full and equal rights to land and other resources" (paragraph 7). Also in 2006, the Assembly of the Inter-Parliamentary Union called "upon parliaments to ensure that women have access to land ownership and are allowed to manage natural resources, as balanced ownership patterns are a principal requirement for avoiding environmental degradation" (Resolution on the Role of Parliaments in Environmental Management and in Combating Global Degradation of the Environment", 114th IPU Assembly, Nairobi, 7–12 May 2006, *Summary Records of the Proceedings*, Inter-Parliamentary Union 2006, p. 166).



Compliance with Environmental Conventions

– The Role of Public Involvement –

by Veit Koester and Tomme Young*

NOTE: This article represents the opinions and analyses of the authors alone, and is not offered in any official capacity. It focuses on the particular matters discussed in Koester's recent presentation at the "Inier-Forum meeting on involving the public in International Forums" (20–21 June 2007, Geneva) – a forum within which representatives of diverse forums were able to meet together informally to exchange experiences of their practices with respect to access to information, public participation in decision making and access to justice.¹ The article was elaborated by T. Young from Koester's speaking notes, in the first instance, and then evaluated and adjusted by V. Koester. This article also draws on his other research and analyses on this issue.² The article is not intended as an academic paper, but rather as a paper discussing an important issue in international environmental policy and law.

This article focuses on the compliance mechanisms under multilateral environmental agreements (MEAs), especially whether such mechanisms provide for public participation, and whether such participation is desirable. A number of international instruments include particular "compliance mechanisms" aimed at overseeing compliance with the instrument. The examples of these provisions that are directly referred to below include the Aarhus Convention,³ Kyoto Protocol,⁴ Alpine Convention,⁵ Protocol on Water and Health,⁶ Bern Convention,⁷ CITES,⁸ LRTAP Convention,⁹ Espoo Convention,¹⁰ Basel Convention,¹¹ Montréal Protocol¹² and Cartagena Protocol.¹³ Additionally, the Stockholm Convention¹⁴ and the Rotterdam Convention,¹⁵ both of which have entered into force relatively recently,¹⁶ are currently engaging in discussions aimed at establishing compliance mechanisms.

The topic of compliance with the requirements of MEAs is rather vast. It includes both compliance problems relating to specific actions and general issues of compliance with the MEA, and it includes compliance control at both the national and the international level. Furthermore, the subject includes the formal involvement of the public, as well as many examples of involvement in practice, such as opportunities for the public to address issues of compliance at COPs or MOPs in connection with agenda items concerning national reports or implementation of MEAs. The scope of this article is limited to a brief analysis of public involvement in promoting compliance in respect of specific parties whose activities are subject to "compliance mechanisms" in MEAs.

Unique Aspects of "International Compliance" Mechanisms

In international environmental instruments, nearly all compliance mechanisms are designated to promote compliance, rather than to redress the consequences of non-compliance or sanction the offenders. The most obvious exception to this general approach is the Kyoto Protocol

compliance mechanism, through which certain types of "consequences" may potentially be imposed in cases of non-compliance.¹⁷

Although most compliance mechanisms include provisions enabling (to some extent) Parties to submit complaints about other Parties' non-compliance, in practice, most of them deal only with self-submissions by governments, i.e. Parties' submissions in respect of themselves and their country's particular issues in implementing the international requirement. These submissions are not very interesting to members of the public and public interest groups, given that a self-submission is in reality a kind of declaration of guilt. After this *mea culpa*, the Party is typically seeking help or advice. Party-to-Party submissions are extremely rare.

For purposes of public participation, although public welfare and perspectives must be included in all levels of compliance activities, it is usually the specific cases of non-compliance that are closest to the everyday life of people.

Involving the Public in Compliance Deliberations

Public involvement in compliance mechanisms may be direct or indirect; the latter including various "degrees of indirectness".

Direct Involvement

Some of the most important potential elements of direct public participation at international level can be (i) the nomination of members to the compliance body; and (ii) the ability of members of the public to trigger compliance-related inquiries.

To date, only one compliance mechanism – namely, the compliance mechanism of the Aarhus Convention – offers direct public involvement by providing a right of the public to nominate members of the compliance body. In addition, the Protocol on Water and Health provides almost the same opportunity.

In the Alpine Convention, although not allowed to nominate members of the Reviewing Committee (a body composed of representatives of Parties), observers represented in the Standing Committee of the Alpine Convention are specifically authorised to send two representatives to Reviewing Committee discussions. ➔

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There is a linkage between nomination of members of the compliance body and the effectiveness of that nomination as a means of public participation. The right to nominate members becomes meaningful only if members of the compliance body are independent, i.e. not belonging to an executive branch of the Government.

Few compliance mechanisms may be triggered by members of the public. To our knowledge only the Alpine Convention, the Bern Convention, the Aarhus Convention, the Protocol on Water and Health and, to some extent, CITES provide such a right. It must be admitted that not all MEAs are well suited for compliance mechanisms, especially not those in which the Parties' specific obligations are stated in general and/or rather soft terms like the Convention on Biological Diversity (CBD).

A number of MEAs, including the conventions adopted through the UN Economic Commission for Europe (ECE) could and should include a public trigger. In support of this statement, it is notable that:

- a) where it exists in the conventions listed above, the public trigger has caused no notable difficulties;
- b) the public trigger has not been misused;
- c) the party-to-party trigger is not effective;
- d) the argument that some MEAs are too complicated or too technical for the public to understand is simply not credible, in light of the public contribution experienced in other MEA deliberations; and
- e) only the public trigger has a real chance to promote compliance *vis-à-vis* individual parties.

Indirect Involvement

Opportunities for indirect involvement of the public may be provided in many ways, including the right or ability to:

- provide information relevant to the compliance issue, where the instrument not only provides a right to submit this information but clarifies the level of the compliance body's (and/or secretariat's)¹⁸ right or duty to consider such information;
- attend meetings of compliance bodies;
- make statements at such meetings;
- provide comments, in writing, on specific cases of non-compliance;
- receive notice of, be informed about, or seek information regarding pending cases of non-compliance;
- seek information on draft or preliminary findings and conclusions of compliance bodies, with a view to providing comments; and/or
- play a role in respect of implementation of non-compliance response measures.

These opportunities, however, are currently offered only to a very limited extent. Open and transparent procedures providing opportunities for public involvement are – as far as we are aware – only available in respect of compliance procedures under the Aarhus Convention, to some extent under the Bern Convention and CITES. It remains to be seen what rules on participation will be adopted by the Water and Health Protocol, and particularly whether (and to what extent) procedures under the Aarhus Convention will be incorporated.

The Impact of Transparency

Apart from the Aarhus, Bern and CITES examples, most other compliance mechanisms operate in a non-transparent manner. For example, meetings of the implementation committee of the ECE Air Pollution Convention (LRTAP) and its protocols, and of the Espoo Convention (when it is considering specific submissions) are not open to the public. The same is true of a number of other compliance mechanisms, spanning a range from complete non-transparency through to some opportunities for open meetings. Thus, for example:

- meetings of the “compliance procedure” of the Montreal Protocol are all closed;
- under the Alpine Convention, all discussions of the Reviewing Committee are confidential;
- compliance discussions under both the Basel Convention and, as tentatively decided, of the Stockholm Convention are closed to the public unless both the Committee and the Party concerned agree otherwise;
- under the Cartagena Protocol's compliance mechanism, a specific decision on whether to meet in closed or open session must be taken at every meeting of the Compliance Committee and the reasons must be stated;
- under the Rotterdam Convention, it has been tentatively decided that deliberations can be open if the Party concerned agrees;
- under the Kyoto Protocol, the hearings conducted by the Compliance Committee's Enforcement Branch are closed with only the decision being released to Parties and the public. Information from those meetings may be made public at an earlier stage “ unless the branch decides, of its own accord or at the request of the Party concerned, that information provided by the Party concerned shall not be made available to the public until its decision has become final.”¹⁹

These decisions, however, are not always “set in stone”. The transparency rules of most of these mechanisms are expressed in procedural decisions of the COP or of the compliance mechanism itself, rather than in the Convention. Thus changes may be made without new plenipotentiary processes, if the Parties desire. In addition, the compliance processes of both the Rotterdam and Stockholm Conventions are still in discussion.

Why this general trend of “secrecy”? The usual argument in favour is that cases of non-compliance involve politically sensitive issues. Nonetheless, the rules governing all of these mechanisms include specific provisions on confidentiality, in addition to the provisions for secret deliberations.

However, if there is a situation of non-compliance, this fact will be revealed no later than at the COP or MOP where recommendations of the compliance body are going to be discussed. This raises a follow-up question – if non-compliance was politically too sensitive to be discussed at an open meeting by the compliance body why can it then be discussed at an open COP or MOP? In this respect, we do not accept the argument of specific cases of non-compliance being politically too sensitive to allow open decision making.

To Conclude:

The importance of compliance mechanisms under the MEAs is undisputed, if one considers a very basic argument, in four parts:

First, if MEAs are deemed important, it must be because they are considered important for human health and life, for that matter all life. With these objectives, the commitments created under the MEA are designed to protect life, health and the environment.

Second, the effectiveness of each MEA is closely related to the extent to which its requirements are implemented and complied with. Non-compliance with MEAs results in non-respect for MEAs and detriment to the goals of health, life and conservation.

Third, and in some ways most important, the question of compliance with the MEAs is not merely political. The failure of the MEAs to meet their objectives might have serious implications with regard to people's everyday life.

Clearly, promoting compliance with the MEAs is a common concern of the world society, as such. Why, then, should the public not be involved to the extent possible in compliance mechanisms?

There are, of course, many ways and means of involving the public in promoting compliance, including actions and oversight in many other ways, beyond the use of MEA compliance mechanisms. One obvious and important body of examples are the provisions for involving the public in national reporting. International instruments and processes, however, may play an important role both in motivating national compliance through the adoption and implementation of required measures and in providing an effective pathway for addressing specific cases of particular concern or political sensitivity.

The means outlined above represent good practices, within that more limited realm of international compliance mechanisms. The further limitation of those mechanisms by limiting or excluding public participation appears to be occurring without any good reason.

Notes

1 See http://www.unece.org/highlights/unece_weekly/weekly_2007/UNECE_weekly_2007-227.pdf for more information on this meeting.

2 These articles provide more information on this issue, particularly in the context of the Aarhus Convention: Veit Koester (2007) "The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention)": Chapter 8 of Geir Ulfstein, *Making Treaties Work: Human Rights, Environment and Arms Control*, pp. 179–217 (Cambridge University Press); Veit Koester, "Compliance Review under the Aarhus Convention: A Rather Unique Compliance Mechanism" (2005), 2 *Journal for European Environmental and Planning Law* 31–44; and Veit Koester, "The Compliance Committee of the Aarhus Convention: An Overview of Procedures and Jurisprudence" (2006), 37 *Environmental Policy and Law*, issue 2–3, pp. 83–95 (all articles include references to relevant decisions, documents and literature); and C. Pitea, "NGOs in Non-Compliance Mechanisms under Environmental Agreements: From Tolerance to Recognition?", in T. Treves, M. Frigessi di Rattalma, A. Tanzi, A. Fodella, C. Pitea and C. Ragni (eds.), *Civil Society, International Tribunals and Compliance Bodies* (The Hague: TMC Asser Press, 2004), pp. 205–24 (which, in note 1, contains references to the recognition of NGOs, in general, as subjects of international law and also, in Part 6 of its Annex, contains an extremely useful list of compliance mechanisms; the list includes very detailed references to all relevant documents and also includes compliance mechanisms under negotiations).

3 Aarhus Convention at Article 15 commits the parties to "establish, on a consensus basis, optional arrangements of a non-confrontational, non-judicial and consultative nature for reviewing compliance with the provisions of this Convention."

The detailed structure and procedures of the Committee were established by the first Meeting of the Parties to the Aarhus Convention, and are contained in MOP Decision 1/7 (ECE/MP.PP/2/Add.8.) The full text of the Aarhus convention can be found online at <http://www.unece.org/env/pp/>.

4 Kyoto Protocol to the United Nations Framework Convention on Climate Change (Kyoto, Japan, 1997), at Article 18. The establishment, rules and procedures of the Compliance Committee are set forth in Decision 27 of the "first session of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol" (referred to in UNFCCC parlance as CMP 1), found online at <http://unfccc.int/resource/docs/2005/cmp1/eng/08a03.pdf#page=92>.

5 *La Convention sur la protection des Alpes* (Salzburg, 1991) available in German, French, Italian and Slovak. The *Comité de vérification* (the Reviewing Committee) was established under Article 8. The rules governing it can be found online at <http://www.convenzionedellealpi.org/NR/rdonlyres/882A8237-6736-4AEF-8CE2-2318EC63FFD9/0/AC07VII4fr.pdf>.

6 Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes (London 1999).

7 Convention on the Conservation of European Wildlife and Natural Habitats (Bern, Switzerland, 1979.) Herein the "Bern Convention". Under this instrument, although there are no explicit provisions on establishment of a compliance mechanism or compliance control, a mechanism has evolved generally based on Article 14 (functions of the Standing Committee, a body similar to a COP) which calls on the Standing Committee to keep track of application of the Convention, and authorises it to, *inter alia*, make recommendations to the Contracting Parties concerning measures to be taken for the purposes of the Convention, including recommendations based on national reporting, and general issues of compliance. The Standing Committee has made a number of such recommendations. This basic provision has been supplemented through practical use and rules established by the Standing Committee regarding recommendations to Parties (1984) and on opening and closing of files (in use since 1993, but only on a provisional basis, due to concerns about the relationship between the rules and EU infringement procedures), supplemented by specific rules of procedure. See Bern Convention, doc. T-PVS (99) 2 and T-PVS (99) 16.

8 Convention on International Trade in Endangered Species of Fauna and Flora (Washington, 1975). Compliance issues are addressed by the Standing Committee, created to enable the COP to fulfil its responsibilities under Article XIII of the Convention. It was created in the 1970s and had its first meeting in 1979. Its current establishing legislation and rules of operation were adopted in 2000, as Resolution Conf. 11.1 (Rev. COP-13), available online at <http://www.cites.org/eng/res/11/11-01R13.shtml>. In addition, in CITES COP-14, the Parties took note of a non-binding "Guide to CITES Enforcement", which rigorously describes all current practices of the COP, Secretariat and Standing Committee to oversee and encourage compliance with the obligations of the Convention. Resolution Conf 14.3 found online at <http://www.cites.org/eng/res/14/E14-03.pdf>.

9 Convention on Long-range Transboundary Air Pollution (Geneva, Switzerland, 1979). The Implementation Committee of the LRTAP Convention was established by Decision 1997/2 of the LRTAP Executive Body (found online at <http://www.unece.org/env/documents/1998/ece/eb/ece.air.53.e.pdf#page=32>, pp. 29–31).

10 Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, Finland, 1991). The Implementation Committee of the Espoo Convention was established by Decision III/2 of the 3rd Meeting of the Parties (available online at <http://www.unece.org/env/eia/EIAdesicionIII2.htm>).

11 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel, Switzerland, 1989). The Basel Convention's Compliance Mechanism operates under Terms of Reference adopted by the 6th COP as its Decision VI/12 (<http://www.basel.int/meetings/cop/cop6/english/Report40e.pdf#VI12>), at p. 45.

12 The Montreal Protocol on Substances that Deplete the Ozone Layer (adopted Montreal, Canada, 1987; variously amended/adjusted in London, 1990; Copenhagen, 1992; Vienna, 1995; Montreal, 1997; Beijing, 1999). The Protocol's "non-compliance procedure" was finally adopted as a permanent process in MOP-4, Decision IV/5 (and see annexes IV and V) available at http://ozone.unep.org/Meeting_Documents/mop/04mop/4mop-15.e.doc, at pp. 16, 52–55.

13 The Cartagena Protocol on Biosafety to the Convention on Biological Diversity (Montréal, 2000). The Compliance Committee is specifically mandated under Article 34 of the Protocol. Its establishment and procedures are set out in COP-MOP decision BS-I/7 (<http://www.cbd.int/decisions/default.shtml?m=MOP-01&id=8289&lg=0>).

14 Stockholm Convention on Persistent Organic Pollutants (POPs) (Stockholm, 2001), available online at <http://www.pic.int/en/ConventionText/ONU-GB.pdf>.

15 Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (Rotterdam, Netherlands, 1998). Online at <http://www.pic.int/home.php?type=&id=49&sid=16>.

16 The Stockholm Convention entered into force in 2004, and the Rotterdam Convention in 2006.

17 CMP 1, Decision 27 at Article XV.

18 Where the secretariat is entitled to submit cases of non-compliance to the compliance body.

19 CMP 1, Decision 27 at Article IX.



Defendiendo la Naturaleza

por Silvia Jaquenod de Zsögön*

Con la finalidad de sensibilizar sobre la importante labor que están desarrollando las Fuerzas Armadas en materia ambiental, aquí se desarrolla la vinculación existente entre la actividad de éstas y el escenario en el que realizan sus actividades, es decir, la Naturaleza en su más amplio sentido y alcance, considerando en conjunto el medio natural y el creado por el ser humano. El enlace directo se traduce en la función pública ambiental de las Fuerzas Armadas, y su proyección más allá del espectro de la pura contienda. Considerando la evolución de la sociedad y, naturalmente, de las Fuerzas Armadas, ya no es posible asignarles ni identificar a éstas exclusivamente con esa misión “tradicional” de litigio o estado transitorio de lucha.

La actual función de las Fuerzas Armadas va mucho más allá del ámbito exclusivo del conflicto bélico, concepción entonces tradicional que puede afirmarse hoy no responde a la dinámica sociopolítica. Incluso, han evolucionado los conceptos de seguridad y defensa, aspectos que se integran con un abanico de situaciones diferentes a las de la pretérita concepción.

Las tareas de recuperación de zonas castigadas por fenómenos naturales con consecuencias catastróficas (inundaciones, incendios, terremotos, tornados, erupciones volcánicas, huracanes), roturas de presas, escapes nucleares, vertidos de sustancias contaminantes, hambrunas, actuaciones de salvamento, presencia en áreas de riesgo bélico, restauración de ciudades afectadas por acciones militares, voluntariado... son intervenciones en las que las Fuerzas Armadas dibujan un nítido perfil alejado de las misiones bélicas.

El análisis parte de consideraciones generales sobre las armas y los tipos de guerra con las repercusiones socioculturales, económicas y ambientales de éstas, las causas generadoras de conflictos a través de los diferentes recursos naturales (aguas, vegetación, fauna, minerales...). Se revisan los conceptos de defensa y seguridad nacional, vinculados a la variable ambiental, destacando un estudio pormenorizado de la función pública militar y la actividad militar como servicio público ambiental. Se incorporan ejemplos de diferentes ejércitos en relación con la integración de la variable ambiental, con especial referencia a los trabajos realizados por el Ministerio de Defensa de España. Se alude a los parques para la Paz y, finalmente, se hace un bosquejo picasiano sobre una futura estrategia militar ambiental.

Queda determinada la vinculación existente entre la actividad de las Fuerzas Armadas y el escenario en el que éstas realizan sus actividades, es decir, la Naturaleza en su más amplio sentido y alcance. El enlace directo se traduce en la función pública ambiental de

las Fuerzas Armadas, y su proyección más allá del espectro de la pura contienda.

Las Fuerzas Armadas representan una especial fuerza política, social e incluso económica. A estas características de la función militar hay que incluir las tareas de carácter ambiental, positivas actividades que se desarrollan por un lado, para la protección, conservación y restauración del ambiente degradado y, por otro, como apoyo a situaciones conflictivas que dan lugar a tensiones surgidas por la necesaria unidad de los recursos naturales y la exclusividad pretendida por los Estados (piénsese en los casos de aprovechamiento de recursos naturales comparados).

Tradicionalmente se reconoce a las Fuerzas Armadas la misión de:

- defensa e integridad de las fronteras internacionales;
- garantía de la paz interior;
- mantenimiento de la paz internacional;
- socorro en casos de desastres.

Estas funciones se completan con la necesaria tarea de protección y recuperación del ambiente, al considerarse como amenazas a la seguridad de los Estados el conjunto de riesgos ambientales.

Dada la relativamente novedosa introducción en el ordenamiento jurídico español del concepto de Función Pública Militar, resulta en cierta manera difícil de acotar, ya que su mismo empleo provoca en ciertos sectores un velado rechazo. En tal sentido cabe señalar a título de ejemplo, que en la propia norma que prevé positivamente tal concepto, es decir la Ley 17/89, decayó su inicial denominación de “Ley de la Función Pública Militar” para pasar a intitularse “Ley del Régimen del Militar Profesional”, pese a que el primer enunciado se ajustara más correctamente al ámbito de la Ley y a su propio contenido.

La referencia más inmediata, el Preámbulo de la Ley 17/89, aporta los primeros criterios delimitadores del concepto de Función Militar al señalar de la misma, con absoluta coherencia, que se trata de una *actividad de interés público*, por lo que utilización del concepto Función Pública Militar supone partir del previo reconocimiento de la existencia de un servicio público, subordinado al *bien común*, del que se *beneficia* la sociedad en su *conjunto*, dirigido esencialmente a cumplir los fines enunciados en el artículo 8.1. de la Constitución vigente, “Las Fuerzas Armadas, constituidas por el Ejército de Tierra, la Armada y el Ejército del Aire, tienen como misión garantizar la soberanía e independencia de España, defender su integridad territorial y el ordenamiento constitucional”, es decir la defensa de la soberanía e independencia del Estado junto a su ordenamiento constitucional. He allí, justamente, uno de los pilares básicos de apoyo a la función pública ambiental de las Fuerzas Armadas: la defensa de la integridad territorial, entendiendo por tal a la globalidad del territorio con la totalidad de sus recursos naturales. Ade-

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más, se trata de una actividad de “interés público” y nada más cercano a éste que el mantenimiento de un entorno adecuado para todos los seres, un medio en el cual todos los vivan y desarrollen con dignidad. Se trata, asimismo, de una función de preservación, de precaución, de cautela, de anticiparse a la ocurrencia de los hechos que pudieran afectar al ambiente considerado en su globalidad.

Las misiones encomendadas a las Fuerzas Armadas pueden agruparse en dos apartados perfectamente diferenciados: la defensa exterior y la defensa interior, en ambos oscila la presencia de la defensa ambiental.

En el primer caso, defensa exterior, queda claro que en el sistema constitucional español debe ser defensiva, extremo que se recoge en el Preámbulo de la Constitución española “La Nación española, deseando establecer la justicia, la libertad y la seguridad y promover el bien de cuantos la integran, en uso de su soberanía, proclama su voluntad de: [...] Colaborar en el fortalecimiento de unas relaciones pacíficas y de eficaz cooperación entre todos los pueblos de la Tierra.” En el segundo caso, defensa interior, cabe el auxilio, protección, cuidado y defensa de su integridad territorial incluida la conservación de los recursos naturales y la colaboración en casos de emergencia ambiental o catástrofe natural, tal como inundaciones, derrame tóxico, emisión de gases, incendio forestal, entre otras, y mantenimiento del orden público, por ejemplo, en situaciones extremas en la que peligre el patrimonio histórico, artístico y cultural.

En ambas situaciones, defensa exterior e interior, cabe la participación activa del voluntariado ambiental. Por tanto, no se excluye la defensa de la plataforma biológica y la de los recursos naturales estratégicos y compartidos, siempre que se respete la soberanía de los Estados y las normas del Derecho internacional. Ahora bien, las misiones enunciadas en el artículo 8.1. de la Constitución española no cierran la posibilidad de actuación de las Fuerzas Armadas, puesto que éstas podrían actuar reaccionando en diversos grados ante diferentes situaciones. La dinámica propia de la sociedad ha presionado para que éstas vayan adaptándose progresivamente a las distintas realidades. Así, a requerimiento de las autoridades competentes correspondientes colaboran tanto en situaciones regulares como excepcionales [calamidad, catástrofe, grave riesgo ambiental] cumpliendo con funciones en las que no es posible la utilización de armas, misiones de paz, de reconstrucción de ciudades, de ayuda humanitaria y, desde luego, de auxilio ante casos de fenómenos naturales con consecuencias catastróficas o desastrosas como, por ejemplo, grandes desplazamientos de tierras, terremotos, inundaciones, roturas de presas, vigilancia del patrimonio cultural amenazado.

En la Ley Orgánica de la Defensa Nacional y la Organización Militar el artículo 22.1. establece que “las Fuerzas Armadas, a requerimiento de la autoridad civil podrán colaborar con ella en la forma que establezca la Ley para casos de grave riesgo, catástrofe o calamidad u otra necesidad pública de naturaleza análoga.” Asimismo, en la Ley

2/1985 sobre Protección Civil el artículo 2.2. señala que “en tiempo de paz, cuando la gravedad de la situación de emergencia lo exija, las Fuerzas Armadas, a solicitud de las autoridades competentes, colaborarán en la protección civil, dando cumplimiento a las misiones que se le asignen.”

Las funciones de las Fuerzas Armadas han variado y ampliado sensiblemente su orientación. Han pasado de la tradicional función que les identificaba de defensa en conflictos bélicos, combates y enfrentamientos armados, a la incorporación de una intervención más profesional no armada de los ejércitos, que se suma a la tradicional y que abarca un abanico muy amplio de situaciones en las que las Fuerzas Armadas cobran un papel determinante para el restablecimiento del orden. Así pues, la naturaleza “administrativa” de las Fuerzas Armadas se confirma en el artículo 97 de la Constitución española, bajo el Título del Gobierno y de la Administración, “El Gobierno dirige la política interior y exterior, la administración civil y militar y la defensa del Estado...”, con lo cual cabe afirmar, apoyando la base de este análisis, que las Fuerzas Arma-



Courtesy: FW

das se integran en la Administración del Estado. De esta forma, siendo fuerzas que pertenecen a la Administración del Estado y, por tanto, funcionarios que sirven al Estado y cumplen cometidos complementarios a los tradicionales garantizando el orden público a través de la conservación, cuidado, recuperación y mantenimiento de los recursos naturales. He allí, justamente, la función pública ambiental de las Fuerzas Armadas. Históricamente, desde comienzos de la edad contemporánea se ha considerado al Ejército como un instrumento al servicio del Estado, monopolizador de la fuerza, proporcionándole la necesaria seguridad al objeto de desarrollar sus funciones y cometidos. Es decir, de forma más precisa, posibilitándole satisfacer una de sus primeras necesidades: existir, ya que “el Estado ha de realizar su destino”.¹ Aseveración que conduce necesariamente al concepto de Defensa Nacional. En este sentido, para algunos autores como Oehling,²

la defensa, entendida como defensa militar o armada, es el fin primario del Estado, precediendo a cualquier otra función u objetivo. Lógicamente este planteamiento no podría propugnarse actualmente en toda su extensión; pese a que la paz y la seguridad son principios básicos que todo Estado intenta garantizar y de hecho asegura, la propia evolución del Estado – de los Estados en general – hace que se arbitren otro tipo de soluciones o instrumentos de tipo jurídico o político que pueden llegar a responder de forma eficaz a los fines para los que fueron concebidos aquellos principios. No obstante, la utilización pública de la fuerza armada no puede ser desdeñada y en este orden, la defensa del Estado se ha articulado tradicionalmente en torno a una organización armada, en torno a un Ejército que llega a configurarse una verdadera personificación de dicha defensa. Cabe reflexionar acerca de la consideración de las Fuerzas Armadas como parte de la Administración Pública. En la doctrina francesa la subordinación de aquéllas al poder político tiene significado de incluirlas dentro de la estructura de servicios del Estado, es decir, dentro de los servicios de la Administración Pública. Por tanto, la organización militar se considera como una estructura administrativa especializada carente de poderes de decisión política. Los órganos militares representan instancias administrativas técnicas dotadas de funciones diversas tales como la consulta, la información y la ejecución.³ Moreau y Bonnard entienden que los ejércitos son una especie de policía administrativa que garantiza la paz pública.⁴

Hay autores que separan las funciones de policía de las de defensa nacional. Laferrrière entiende que, aún siendo funciones y servicios distintos, la policía y la actividad militar del Estado se integran en una categoría global más amplia y con mayor alcance que son las actividades genéricas de conservación de la sociedad. Y, en esta misión de conservar a la sociedad se incorpora directamente el servicio público ambiental de las Fuerzas Armadas, como un servicio público esencial superior. A la vista de estas consideraciones, fácilmente alcanza la necesidad de una fuerza armada permanente dispuesta a la defensa del Estado. Una defensa amplia, global e integral que incluye la conservación de los recursos naturales situados bajo la jurisdicción del Estado. El artículo 8.1.⁵ de la Constitución de 1978 confirma sobradamente esta afirmación e incluso en aquellas Normas fundamentales ubicadas en contextos sociopolíticos fuertemente críticos con la existencia de una organización armada de carácter permanente como sucediera durante el período de elaboración de la Constitución de 1812 y, más distanciada en el tiempo, en la Constitución de 1931, acabarían admitiendo de forma positiva su presencia en el seno del Estado como instrumento para la consecución de los precitados objetivos.

Pues bien, partiendo de esta premisa en la que se ha establecido de forma muy sucinta la necesaria presencia de una organización armada de carácter permanente, es decir de un Ejército, una primera aproximación referente a qué debe entenderse por tal vendría descrita en la línea tradicionalmente apuntada por Martínez Alcubilla, el cual

entiende por Ejército “la universalidad de las fuerzas costeadas por el Gobierno, o la reunión de una parte de estas fuerzas con un objeto o destino especial”,⁶ destino que, coherentemente con lo expuesto en las líneas precedentes, no sería otro que la defensa exterior del Estado y la conservación del orden interior. Puede concluirse que, entre los distintos sistemas organizativos que integran el Estado, éste dispone de una especial y peculiar organización armada, calificada como Ejército, destinada a garantizar su existencia aportando la necesaria seguridad y defensa frente a posibles agresiones sin perjuicio que, en determinadas ocasiones, puedan serle encomendados otros fines distintos al expuesto. Es decir, este elemento constitutivo del Estado se configura como un auténtico servicio, al cual pueden serle exigidas una serie de prestaciones. En este sentido, puede entenderse como función particular de las Fuerzas Armadas el servicio de protección frente a agresiones externas a recursos naturales situados dentro de la jurisdicción del Estado español. Este servicio ambiental, o función pública ambiental, cobra aún mayor trascendencia cuando se trata de la defensa de recursos naturales fronterizos, al ser éstos sitios geopolíticamente estratégicos. Efectivamente, en una dimensión más amplia,⁷ tal organización, que también puede ser identificada como Administración Militar, se define siguiendo nuevamente a Guaita como el “sector de la actividad administrativa que provee a la seguridad y defensa exterior e interior del Estado”,⁸ noción⁹ que viene a coincidir con la realizada por otros autores como García Oviedo o, en el ámbito comparado por Zanobini.¹⁰

Cabe hacer referencia expresa al artículo 15 de la Ley Orgánica 5/2005 de Defensa Nacional, en el Título III-Capítulo I sobre la misión de las Fuerzas Armadas:

Título III – Misiones de las Fuerzas Armadas y su control parlamentario

Capítulo I – Misiones de las Fuerzas Armadas

Artículo 15 – Misiones

1. *Las Fuerzas Armadas, de acuerdo con el artículo 8.1 de la Constitución, tienen atribuida la misión de garantizar la soberanía e independencia de España, defender su integridad territorial y el ordenamiento constitucional.*
2. *Las Fuerzas Armadas contribuyen militarmente a la seguridad y defensa de España y de sus aliados, en el marco de las organizaciones internacionales de las que España forma parte, así como al mantenimiento de la paz, la estabilidad y la ayuda humanitaria.*
3. *Las Fuerzas Armadas, junto con las Instituciones del Estado y las Administraciones públicas, deben preservar la seguridad y bienestar de los ciudadanos en los supuestos de grave riesgo, catástrofe, calamidad u otras necesidades públicas, conforme a lo establecido en la legislación vigente.*
4. *Las Fuerzas Armadas pueden, asimismo, llevar a cabo misiones de evacuación de los residentes españoles en el extranjero, cuando circunstancias de inestabilidad en un país pongan en grave riesgo su vida o sus intereses.*

En este artículo se hace clara mención a la defensa de la integridad territorial que, por ejemplo, puede ser afectada por diferentes fenómenos naturales o actuaciones antrópicas; concretamente el apartado tercero del artículo 15 alude a supuestos de grave riesgo, catástrofe, calamidad u otras necesidades públicas, en las que las Fuerzas Armadas pueden intervenir coadyuvando al restablecimiento de la paz y la estabilidad. El Plan General Ambiental del Ministerio de Defensa de España consta de un Plan a Largo Plazo (15 años) que contiene otro Plan a Medio Plazo (6 años) a fin de concretar la Política ambiental de Defensa, expresando sus objetivos generales y recogiendo sistemática y detalladamente la planificación de recursos. La Directiva 107/1997 y la Instrucción 30/1998 definen y detallan esa política, que habrá de ser compatible con la misión de las Fuerzas Armadas y estará dirigida a alcanzar los objetivos e intenciones de la legislación vigente. Los medios para actuar a favor del ambiente son los generales de la organización de las Fuerzas Armadas y otros establecidos a tal efecto por la normativa.

Asimismo, para facilitar la consecución de los objetivos se implantarán, en todo el ámbito del Departamento Sistemas de Gestión Ambiental, conforme a la Norma UNE-EN ISO 14001. Los objetivos generales son:

- *Concienciación*: Mejora de la conciencia individual y colectiva en las Fuerzas Armadas con respecto al ambiente, mediante el conocimiento de la situación y programas de formación, información y divulgación, tanto interna como externa.
- *Ahorro energético y fomento del uso de energías alternativas*: Ahorro y eficiencia en el consumo, potenciando en lo posible la utilización de energías más limpias y/o renovables.
- *Protección del medio natural*: Actuaciones agroforestales en las propiedades de Defensa y establecimiento de normas de comportamiento y/o actuación que prevengan el deterioro del medio natural y faciliten su recuperación allí donde resulte posible.
- *Mejora de la calidad ambiental*: Lucha por minimizar la contaminación que las Fuerzas Armadas y sus actividades puedan producir al ambiente, en toda su extensión.

Notes

1 García Oviedo, C. Y Martínez Useros, E. (1968) Derecho administrativo. Acción administrativa especial y justicia administrativa – EISA – 9ª Edición – Página 481 – Madrid.

2 Oehling, H. (1967) La función pública del ejército – Instituto de Estudios Políticos – Página 38 y siguientes – Madrid.

3 De Vergottini, citado por López Ramón, F. en La caracterización jurídica de las Fuerzas Armadas (1987) Centro de Estudios Constitucionales – Madrid.

4 Moreau, F., “en el mantenimiento de la paz pública interior, sitúa al ejército en una segunda línea, tras los agentes civiles de la fuerza pública, los guardas rurales y los agentes de policía”, citado por López Ramón, F. en La caracterización jurídica de las Fuerzas Armadas (1987) Centro de Estudios Constitucionales – Madrid.

5 Artículo 8.1. de la Constitución española: Las Fuerzas Armadas, constituidas por el Ejército de Tierra, la Armada y el Ejército del Aire, tienen como misión garantizar la soberanía e independencia de España, defender su integridad territorial y el ordenamiento constitucional.

6 Martínez Alcubilla, M. Boletín Jurídico Administrativo – Anuario de Legislación y Jurisprudencia – Página 472 – Madrid.

7 La segunda visión del concepto Administración Militar transporta a un senti-

do restringido o estricto de la misma, entendiendo por tal y siguiendo a Guaita, A. (1961) Derecho administrativo especial – Páginas 65 y 66, “esa reducida parte del Ejército encargada de asegurar el funcionamiento de las restantes unidades y servicios al dotarlos de medios de acción”, o acudiendo a antecedentes normativos más mediatos, la referencia que ya hacía la Constitución de 1812 en su Título VIII sobre “Fuerza Militar Nacional” al hablar de Administración Militar como uno de los aspectos necesarios para la buena constitución del Ejército, volviéndose a repetir tal mención a lo largo de diferentes textos normativos como, por ejemplo, en la Constitutiva del Ejército de 29 de noviembre de 1878 donde, al referirse a la composición del Ejército, hace referencia al Cuerpo de Administración Militar. En resumen, se considera a la Administración Militar como un Cuerpo dentro de la organización militar o, nuevamente siguiendo a Guaita, de organización estática o territorial del Ejército. También Guaita, A. (1988) “Los derechos fundamentales de los militares” en Jornadas sobre el Título Preliminar de la Constitución – Volumen IV – Ministerio de Justicia. Secretaría General Técnica – Página 2565 – Madrid.

8 Guaita, A. (1969) Derecho administrativo especial – Volumen I – 3ª Edición – Página 67 – Librería General – Zaragoza. 174.

9 Idea que, pese al tiempo transcurrido, sigue conservando vigencia, de la que sólo cabría matizar, puesto que hoya parecería innecesaria por superada, la referencia a la defensa interior del Estado, misión tradicionalmente encomendada a la Administración Militar como subsidiaria fuerza de orden público. Defensa interior que se resume en el mantenimiento del orden social establecido mediante el empleo del Ejército, hoy felizmente superado pero que con mayor o menor grado fue una de las misiones casi permanentes del Ejército hasta épocas relativamente cercanas; Canovas del Castillo, teniendo presente el momento histórico en que vive



Courtesy: DSC

con su especial coyuntura resume perfectamente esta idea en una de las partes del discurso pronunciado en el Ateneo de Madrid en noviembre de 1890, cuya cita se reproduce del libro de Bravo Morata, F. (1978) La República y el Ejército – editorial Fenicia – Página 24 – Madrid. “Los Ejércitos serán, por largo plazo, quizá por siempre, robusto sostén del presente orden social, e invencible dique de las tentativas ilegales del proletariado...” En ese momento era el proletariado, pero siempre ha existido la tentación y la acción de situar al Ejército frente a cualquier alteración del orden, sin buscar o desechando otros instrumentos o soluciones de mejor y menos traumático desenlace, tal y como pone de manifiesto Balbe, M. (1983) Orden público y militarismo en la España constitucional 1812–1983 – Editorial Alianza Universidad – Madrid. En cualquier caso, la Constitución española en el artículo 8 sigue haciendo referencia a la defensa interior, aunque se ha de entender que excluida de los supuestos de normalidad constitucional. A mayor abundamiento, los cambios políticos habidos descargan a las Fuerzas Armadas del peso de sostener un régimen concreto, y la propia dinámica en la organización periférica militar con la supresión de Capitanías Generales, paulatina supresión de los gobiernos militares conforme se vayan estableciendo provincia por provincia, las respectivas Delegaciones de Defensa. Vid Real Decreto 2206/1993 de 17 de diciembre, o la elaboración del Plan para la nueva organización del Ejército de Tierra (Plan Norte) por el que el Ejército de Tierra pasará de un despliegue territorial a otro de carácter funcional, parecen avalar tal afirmación.

10 García Oviedo (1962) Derecho administrativo – 8ª edición – Martínez Useros – Página 972 – Madrid. Zanobini, G. (1952–1959) Corso di Diritto amministrativo – Giuffrè Editore – Milano.

