

The Sword of Reason and the Power of the Law: The Constitutional Right to a Healthy Environment, by Silver Donald Cameron

Tony Oposa was appalled.

In 1990, Antonio Oposa, Jr. – “Attorney Oposa,” as he is now known throughout the Philippines – went walking in the mountains of Cebu, in what used to be the forest – and the forest was gone. Erased. Clearcut. On inquiry, Oposa learned that only 4% of the country’s original forest remained – 800,000 hectares – and the government had issued logging permits for an absurd 3.9 million hectares, five times as much forest as actually existed. If logging weren’t halted immediately, the country would be completely denuded. Future generations would inherit a stripped and wasted landscape. At its heart, the pillage of the forests was an attack on posterity.

Three years earlier, however, after the Marcos dictatorship, the Philippines had adopted a new constitution, Section 16 of which provided that the State “shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature.” If the government was failing to uphold that right, then the government could be sued. And if posterity was the offended party, then posterity should sue.

So Oposa sued Fulgencio Factoran, the Secretary of Environment and Natural Resources, acting on behalf of 43 children (including his own), and on behalf of children not yet born. The plaintiffs demanded that all existing timber concessions be cancelled, and that no new ones be issued. “Minors Oposa vs. Factoran,” as the case is known, was Oposa’s very first legal action — and he lost, largely on the grounds that people who didn’t yet exist had no right to sue.

But he appealed, and this time he won. Ten of the 11 Supreme Court justices agreed that “the rhythm and harmony of nature” inescapably required the “management, renewal and conservation” of natural capital, and imposed on each generation a responsibility to preserve nature for succeeding generations. This is “intergenerational equity,” now known as “the Oposa Doctrine,” and its echoes can be heard in courtrooms around the world. And, though it took some years, all logging in wild forests is now banned in the Philippines.

Oposa went on to win a string of other landmark cases, most notably a massive cleanup of Manila Bay. Now, at 60, he is heading a movement to split all the country’s roads along the centre line, reserving half of every road for the use of cyclists, pedestrians and public transit. This is, he says, simple justice: all Filipinos pay for the roads, but only 2% own cars. And the measure – which seems likely to be adopted – will hugely reduce the country’s carbon emissions as well.

Winning in court is one thing – but stopping rapacious behaviour is another. So Oposa has also taken an active role in enforcement, heading up raids on illegal logging operations, intercepting ships and arresting poachers who were fishing in the Visayan Sea with dynamite and cyanide. (He operates an imaginative “Adversaries to Advocates” program that turns the poachers into wardens.) One of his closest associates was assassinated, and at one point Oposa himself had a million-peso bounty on his head. His approach is not for the faint of heart.

Back in the courtroom, Oposa has made shrewd use of a legal instrument unique to the Philippines, the “writ of kalikasan” (“kalikasan” means “nature”), a court order intended to deal swiftly with environmental threats affecting life, health, or property in two or more municipalities or provinces. A more familiar instrument, which is part of many legal systems, is the “writ of mandamus,” a court order commanding a dilatory organization or individual to perform its legal duties and obligations, or be penalized for contempt of

court. Fulgencio Factoran, for instance, had a legal obligation to steward the forests, but he was constrained by pressure from government and industry. He actually welcomed Oposa's suit, which forced him to do what he wanted to do anyway.

Oposa's bold achievements rely heavily on Section 16 of the constitution, which provides him with a fulcrum to lever massive social change. But the Philippine constitution is by no means unique. Of the 193 nations in the UN, 177 recognize the right to a healthy environment, and 110 have constitutional provisions giving their citizens this right. Some nations go considerably farther. Ecuador and Bolivia, for example, provide legal rights not just to citizens, but to Pachamama — Mother Nature — herself.

Canada, alas, is among the 16 laggards who refuse to recognize the human right to a healthy environment — a sapient grouping which also includes North Korea, Afghanistan, Myanmar and the United States. David Suzuki's current Blue Dot Tour represents a mighty effort to change this, bringing Canada into the mainstream. Like the Democracy Schools operated by the Community Environmental Legal Defence Fund in the US, the Suzuki campaign is aimed not at the national government, but at municipal governments. Towns and counties may not have official jurisdiction, but they are perfectly capable of affirming the rights of citizens and the natural world, and pressing senior governments to follow their lead — as the cities of Santa Monica, Pittsburg and Richmond, BC, have already done. As Oposa likes to say, if the people will lead, the leaders will follow.

Oposa's work in the Philippines is part of a world-wide movement. In India, lawyer M.C. Mehta has forced a cleanup of the Ganges river, and a sharp curtailment of the air pollution that was corroding the Taj Mahal. In Ecuador, attorney Pablo Fajardo sued Chevron and its subsidiary, Texaco, for polluting 1700 square miles of the Amazon watershed with crude oil and production fluids. His clients — 30,000 residents, largely indigenous — won a US\$9.5 billion judgment. Because Chevron long ago pulled its assets from the country, the plaintiffs are now suing to collect through actions filed in other countries, including Canada. In Argentina, an advocate named Daniel Sallaberry obtained a sweeping judgment from the Supreme Court which resulted in a massive cleanup of the desperately-polluted Riachuelo River — a cleanup that in one recent year cost more than a billion dollars.

Similar stories are unfolding in Greece, Costa Rica, Brazil and many other countries. As the executive producer of the documentary film project, **GreenRights** (www.GreenRights.com) I've interviewed the people involved in many such stories, including Fajardo, Oposa and Sallaberry. Their successes are inspiring. But they all rely on the existence of a legally-established right — often a constitutional right — to a healthy environment.

There's a clear link between a country's recognition of environmental rights and its environmental performance, says Dr. David Boyd, the Canadian scholar whose authoritative book *The Environmental Rights Revolution* reviews the spread of these rights around the world.

A constitutional right in particular is “the highest or supreme law of the land,” says Boyd. “It's also something deeper and more profound. It's a reflection of society's most cherished and deeply held values.” In Canada, however, there's a disconnect. We tell pollsters that environmental quality is among our deepest values — but very little in our legal system really expresses that. And without that expression, our ability, as citizens, to preserve the integrity of our environment is badly impaired.

It's just possible that the right to a healthy environment is implicit in Canada's constitution, which does guarantee the right to life — a right which is clearly compromised by a toxic environment. That's the

foundation of a case currently being pursued by Ecojustice on behalf of the Aamjiwnaang First Nation in the smoky oil-refining town of Sarnia, ON. If it succeeds, Canadians will have at least some sort of right to clean air, pure water and healthy food.

Discovering that we do have environmental rights as a necessary implication of our existing right to life would certainly be welcome. That said, it would be much more satisfying if Canadians were to make a conscious decision that we, as a people, wished to assert in our constitution a renewed commitment to the ecosphere that sustains all life.

The Philippine Supreme Court, says Tony Oposa, reminded us “that we are only trustees of the land, the air and the waters for the benefit of generations yet to come.” In forging our new, true relationship with nature, our most powerful weapons will be “the sword of reason, the fire of passion, and the will, the force, and the power of the law.” And the supreme law, everywhere, is the constitution.

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