

ASPECTS CONCERNING THE NECESSITY AND THE OPPORTUNITY OF THE CONSTITUTIONAL ENVIRONMENTAL RIGHTS

Lecturer Ingrid Ileana NICOLAU, PHD.

Faculty of Judicial and Economical Sciences, „Spiru Haret” University, Constanta
(Romania)
ingridnicolau@yahoo.com

Abstract:

The nature of environmental rights requires an international effort aimed at their keeping and protecting. This is due to the interdependency amongst environmental sectors, cross-border effects of destroying the environment and the complex and overwhelming phenomenon such as destroying the ozone layer and global warming. It is very important to understand that the constitutional environmental rights are not a solution for all environmental problems. They must be regarded as a way of approaching environmental problems, by strengthening the existing regulations, by encouraging the drawing up of new regulations.

Key words: *environment, environmental constitutional law, imposing, confirming, pollution*

Nature and definition of environmental rights

The constitutional environmental rights are very important in the process of eliminating the environmental injustice and the fear of the future generations regarding injustice. Given the legal definitions of “health” and “wealth”, other problems connected to the environment could be protected by this right.

Such problems, liberally defined, might include aspects related to the quality of life, esthetics, culture, spirituality. Nevertheless, an environmental constitutional right is not a solution to all environmental problems [1].

The nature of the environmental rights requires an international effort to keep and protect. This is due to the interdependency amongst environmental sectors, cross-border effects of destroying the environment and the complex and overwhelming phenomenon such as destroying the ozone layer and global

warming. These factors illustrate the way regional protection of the environment is beneficial, but they do not provide a solution for the global destruction [2]. Many sectors of the economy have a negative impact on the environment. Processing feedstock, using fuel, mining, deforestation, transportation and distribution methods, industrial processes, users' consuming patterns, products life cycle and many other common practices of the modern world work together to affect many other regions [3]. That way, the environmental protection measures in the USA ensures that the pollution in other countries will not affect the American population or soil. The ozone layer destruction and the global warming have a real and significant impact on the whole humankind. These problems won't be solved unless all actors work together to make the necessary changes. With these three factors in mind, a person can understand that the problems related to environment degradation won't be truly fixed until an international cohesive effort is made. Happily, a big part of the world has already started to get involved.

It is important to understand that the constitutional environmental rights are not a solution for all the environmental problems. They must be regarded as a way of approaching the environmental issues, through strengthening the existing regulations or encouraging the creation of new ones.

What should environmental rights guarantee?

It is logical that the environmental rights should mandate certain obligations and guarantees to the people protected. A right of an efficient environment must include procedural and substantive obligations and rights. Moreover, an environmental right should offer mechanisms of collecting the prejudices from the guilty parties. In order to avoid inherent difficulties in enforcing environmental rights, the definition, the purpose and the guarantees of the right should be very clearly voiced. The more precisely a right is being formulated, the less ambiguous the result would be, followed by a correct legal interpretation [4].

The procedural rights dictate how governments or local entities should operate. These rights ensure the correct and consistent enforcement of the processes and justice in all cases that come before a court. These rights will help the correct illustration of the enforcement procedures of the environmental rights. The proper procedure is very important. An incorrect procedure may violate the person's right to intimacy, free speech, or other basic human rights. The inadequate procedures might also force the court to exclude proofs, to renounce a case, or to sentence against a legitimate case. Dinah Sheldon believes that the procedural rights of an efficient environmental right should require the political participation, informed and acquiescent of the ones affected by the environmental decision. Shelton underlines three procedural rights that an environmental law should guarantee: the right to prior knowledge of such an action, the right to be a part of decision making, the right to appeal to the competent administrative and judicial courts.

Dispositions must be given to activate a mechanism of immediate procedures that guarantees against environmental degrading. Shelton states that, even in the above mentioned procedures, two questions have no answer: 1. How do the rights to information and participation apply to the people from the area neighboring the one directly affected and 2. Who makes the final decision on the projects affecting the environment and what are the limits of the decisive factors? [5] The first question tackles the topic of cross border degradation of the environment. Environment destruction and pollution may originate in one area, but affect many more areas. If foreign countries are affected, information, participation and redress must be provided accordingly. Therefore Shelton's first question tackles the subject of the non-citizens rights. The second question envisions an international scenario. From this perspective, international treaties establishing norms and standards will limit the decision-making factors. The last decision on the environmental problems will belong to the ones in the state of jurisdiction. Nevertheless, the state will be restricted by the limits imposed by the international treaties. In the absence of the norms and the standards imposed by

the international treaties, the second question asked by Shelton remains unanswered in case of a domestic scenario.

What are the difficulties with environmental rights?

There are different difficulties affecting the adoption of environmental rights. Enforcement, the different economic interests, determining the “right” levels of pollution, interaction with the existing legislation and the flexibility problems are only a few of the problems associated with the constitutional implementation of the environmental rights.

According to Betsy Apple [6], an integral component to assuring the enforcement of any right is that it should be “voiced clearly enough to allow a personalized remedy”. She points out that the lack of clarity in context, in the definition of the environmental rights can lead to enforcement difficulties. One single definition of the environmental rights may be interpreted in many ways, leading to more theories regarding responsibilities and results. Apple quotes how legal confusion, economic pressure and the lack of international treaties with a consensus on the issue, contributed to the problems of enforcing the existing environmental rights. Following the logical line of thinking, she states that the environmental rights would be easier accepted and enforced if there were international treaties to guarantee them as human rights. While some international treaties define, acknowledge and try to impose environmental rights as human rights, Apple considers that they are not enough. This is due to the fact that existing international legislation lacks fixed parameters and a written code. Apple claims that because of this ambiguity, the courts consider it risky to refer to this treaties, unless they are enforcing the most known violations of human rights (such as the right not to be tortured). It is also noteworthy that numerous international documents stating that the environmental rights are human rights are not ratified or endorsed by USA. Apple concludes that international treaties specific enough, universal and compulsory accompanied by the majority recognition of the environmental rights would help USA courts to enforce successfully environmental rights.

Sevine Ercmann summarizes the outcomes of three international meetings regarding the enforcement of the environmental legislation [7]. Imposing the environmental legislation is imperative to assure the enforcement of the constitutional environmental rights. The international meetings that Ercmann refers to were sponsored by the U.S. EPA, other US relevant authorities, The Ministries of the Environment of the host countries and the Dutch Ministry for Housing, Physical Planning and Environment. These conferences took place in Utecht, Holland in 1990, Budapest, Hungary in 1992 and Oaxaca, Mexic in 1994. Ercmann underlines the generalities, the necessary imposing measures, the powers to be given to the authorities, the role of public awareness, the role of NGO's and other special interest groups. Ercmann's data is often quoted because they represent an international effort to solve a very specific problem.

Ercmann points out the general methods to guarantee the correct interpretation and enforcement of the environmental legislation. He starts by stating that the requirements of the national and international legislation concerning the administrative, civil, criminal stipulations must be adopted. These legal requirements should begin with confirming measures and a raised administrative control. Ercmann believes that these measures will finally allow a better participation, information and judicial control measures, which will optimize the enforcement. Before all these to be accomplished, terms as "imposing" and "conformation" must be defined [8].

"Enforcing" is a set of actions that government or others execute to confirm to a regulation of the community and to correct or stop situations that imperil environment or public health.

Traditional methods of enforcing include monitoring, inspection, reporting, gathering proofs to locate violations, negotiating with individuals or industrial entities regarding their ways of conforming. The last step to enforce conformity is the ability of enforcing agencies to pursue legal measures and/or to settle agreements. Ercmann underlines that the success of an enforcing program depends on how the states exercise their rights when prioritizing the

environmental needs and the objectives and how they choose the mechanism of enforcement to reach its objectives. Ercmann notes that effective enforcement may require reorganizing of the administrative structures, implementing environmental legislation, using innovative administrative instruments, drafting precise, new laws, renouncing the short-term economic benefits and implementing new long-term imposing instrument, all have associated costs. Cheap and ineffective solutions may lead to larger environmental issues in the future, which will be more difficult and more expensive to deal with.

Public awareness through community motivation, education and incentives helped increasing the efforts even when implementation was hindered by adverse economic impact. NGOs and citizens have also played a very important part in detecting violations and notifying authorities, applying public pressure and helping to enforce the law.

Requiring companies to keep environmental managers also enhances enforcing efforts. These managers must be very well trained and their part is to advise the companies concerning environmental performance. Ercmann identifies the obligations of an environmental manager as [9]: 1) implementing legislation in force; 2) implementing environmental measures and conditions to protect economic use of the involved medium; 3) to keep information about environmental auditing and inspections; 4) to inform the public about the obstacles and to suggest remediation management strategies; 5) to propose the use of proper technologies; 6) to develop and implement measures to restrict, prevent, or diminish waste production; 7) to teach the staff about the environmental measures to be observed. Special consideration should be extended to prevent discrimination against environmental managers. Since their measures may affect company's profit, they can be bound to pressures, job insecurity and poor treatment only because they fulfill their duties. If job's security and fair treatment are not insured, these managers may compromise their activity to keep their employment status. Perhaps, environmental managers, should be appointed by non-governmental agencies and companies should pay their

salaries using guaranteed accounts. This way, security of the job and environmental standards would be high and discrimination would be discouraged.

Different problems of environmental rights enforcement pose particular difficulties. However, John Kinkaid underlines that: “even if such rights may be enforced or not, they serve a symbolic purpose within society and they may be guiding lines for policymakers” [10].

There are many problems regarding environmental issues information. Some natural systems are imperfectly or incompletely understood by science, such as global warming. Some pollution sources are hard to identify, mainly when several sources emit legally accepted pollution levels. Moreover, the causes of some environmental issues are difficult or impossible to identify with a certain necessary accuracy to pursue legal action. Facing these uncertainties, environmental law still needs courts’ protection when the quality of the environment dropped below the minimum guaranteed level.

Another fear of the industry is to invest in new technologies to protect the environment before they are established. Investing in technologies such as reducing emissions are bought and the costs are amortized during equipment lifetime. This allows the initial cost to be spread over time, thus reducing the quarterly and yearly impact of the profit. However, if a technology is bought and has a twenty year life, only to be replaced after ten years with superior technology, government mandated, the company will face significant loss. This is a real problem, often faced. The reality of this problem must not prevent companies from finding ecological solutions. The government may take steps to encourage acquisition of new technologies and to insure the investments made in good faith to protect the environment will not be penalized in future regulations. Thus, if a company makes a safe investment in a technology mandated by the government, should have the right to use this technology. If the new governmental regulations impose more strict technologies (the best available technology), the company should be forced to acquire it only at the end of the 20

year period. Credits could also be offered by the government to acquire ecological technologies. This would make investments in environmental protection technologies more attractive and would set off short-term costs.

Developing environmental rights require revising the old pollution standards and setting new ones. An environmental right should guarantee that pollution standards will be set using the precautionary principle.

Acceptable pollution levels are extremely difficult to determine because people have different sensitivity levels to pollution. Children and the elderly are more sensitive to pollution than adults. Moreover, people with respiratory difficulties, health or cardiac issues are more susceptible to pollution related diseases. Pollution standards should use the health risks for a child as a guide level. Additionally, composed effects of multiple sources emitting acceptable pollution levels should be considered. So that while a source may emit the minimum of pollutants considered as acceptable risk to a child's health, policy makers should also consider the effects of more sources in that area.

Following Rio de Janeiro conference, United Nations Organization preoccupied by human rights issue, continued to analyze the connection between the environment and human rights; in 1994, the special report of the subcommittee fighting against discriminatory practices analyzed not only this connection but also the right to a healthy environment as well as the effects of the environment on exercising other fundamental rights, such as: the right to life, the right to health, the right to food. But the full acknowledgement and guarantee of this right hasn't been reached yet.

In turn, Johannesburg Declaration on Sustainable Development (2002) [11] talks about "people representatives" commitment to build "a global balanced and careful society, aware of the necessities to insure every person's dignity" and expresses the hope that future generations will inherit a world free of the indecency caused by poverty, environmental degrading and unsustainable development models.

Other international documents, such as World Charter of Nature (1982), may be brought up in order to crystalize the defining significations of this fundamental human right.

In the same category of documents, but with a heightened inciting role, is the Recommendation 1614, June 27th 2003, of the Parliament Assembly of the Council of Europe regarding the environment and human rights, which, amongst others, recommends the member states “to acknowledge the human right to a healthy, viable and dignified environment, obliging the state to legally protect the environment, preferably within the constitution; to guarantee the procedural rights acknowledged by the Aarhus Convention, the right to the environment information, to public participation to the decisional process and access to specialized courts [art. 9(III)]” [12].

Slowly, some documents have found specific regulations; thus, the European Charter of the Water Resources (adopted by the Committee of the Ministries of the European Council on October 17th 2001) stipulates that any person has the right to sufficient water quantity to satisfy essential needs and World Water Organizations, UNO actions and the plan to implement the outcomes of the Johannesburg summit (2002) have given special attention to water management and each individual access to drinking water [13].

In terms of content, international documents enounce the notion of an individual right to a certain environment quality. Some documents dedicate another “minimalist” concept that regards the environmental right as violated only when the right to life itself is directly threatened given that the major degrading of the environment quality may endanger the vital biological surviving needs of the humankind.

However, in spite of their deficiencies, international regulations opened the perspective of “constitutionalizing” the right to a healthy and ecological balanced environment, set up procedural guarantees adopted by states in their national legislation and figured mechanisms of insuring its exercise on international cooperation level.

Finally, International Court of Justice signed a broader vision on the environment, pointing out in its 1996 advisory opinion on nuclear weapons license, that environment “is not an abstract concept, but a space where human beings live and responsible for the quality of their life and health, including next generations”.

References:

- [1] World Commission on Environment and Development, *Our Common Future (1987)*, Oxford University Press, p.348;
- [2] Hayward Tim, *Constitutional Environmental Rights: A case for Political Analysis*, Political Studies, 2000, Vol.48, p.559;
- [3] Shelton Dinah, *Human Rights, Environmental Rights, and the Right to Environment*, Stanford Journal of International Law, 1991-1992, vol.28, p.107;
- [4] Simeone Christina, *The Necessity and Possibilities of Constitutional Environmental Rights*, University of Pennsylvania, Scholarly Commons,2006, p.24;
- [5] Ibidem Shelton Dinah, p.117;
- [6] Carnegie Council Website- Apple B., Commentary on *the enforceability of environmental rights, 2006*;
- [7] Ercmann Servine, *Enforcement of Environmental Law in US and European Law: Realities and Expectations*, Environmental Law, Vol.26, p.1213-1236;
- ^[8] Ibidem, p.1215-1216;
- [9] Ibidem, Ercmann, p.1232;
- [10] Kincaid John, *State Constitutions in the Federal System*, Annals of the American Academy of Political and Social Science, vol.496, March 1988, p.18;
- [11] World Summit on Sustainable Development at Johannesburg, August 26th – September 6th 2002 summoned together 104 world state leaders and its main accomplishments were: Johannesburg Declaration on Sustainable Development and The Plan of Implementation of the World Summit on Sustainable Development.
- [12] Duțu M., *Tratat de dreptul mediului*, Third Edition, C.H. Beck Publishing House, Bucharest, 2007, p.316;
- [13] Ibidem, p.317.