

THE DEVELOPMENT OF ENVIRONMENTAL LAW AND THE "NEW RIGHTS" ERA.

ABSTRACT

Environmental law is often included amongst the explosion of "new rights" emerging in the 1970s. This inclusion is only partly true: the rights concerning the environment are the result of a process that began long before the new rights era, but which came to prominence with the recent rapid globalisation and expansion of global governance. This article describes briefly the reasons for the present success of environmental law, its complex interrelationship with the human right to development, and the resulting compromise of sustainable development.

Introduction. The age of the "new rights".

New rights have long been a legislator's nightmare, particularly in the civil law systems of continental Europe. From Justinian, whose *Constitutio tanta*, forbids anyone to add any commentary to the Digest, to the Napoleonic code in post Revolutionary France, there have been frequent prohibitions against modifying or interpreting the law. Unlike the common law systems of the English speaking countries, where law evolves by precedent, the Continental legislator's ambition is to create definitive lasting systems of law, regardless of changing social and economic circumstances. Since the nineteenth century this ambition has characterised the stubborn resistance of the continental legal culture to modification of the rules laid down in the codes : as any European code must guarantee certainty and completeness, social and economic changes had to be diluted and absorbed through the various techniques of interpretation . It is no coincidence that codification has rarely succeeded in administrative law, being the discipline most exposed to the pressures of the changing needs of society and policy.

Everything began to change in the second half of the last century: two events triggered the disruption of the previous structure of the sources of law.

The first is the adoption of Constitutions in the majority of countries emerging from World War II. The second is the inclusion of countries within international and supranational legal systems, for example the European Union and the World Trade Organisation, whose rules in certain areas require the conformity of national law revealing the frailty of ordinary law as the primary source of law.

This created a favourable environment for the development of "new rights". Against this background, and mainly from the Seventies onwards, there were amazing scientific and technological innovations in medicine, biology and genetics, and equally extraordinary innovations in the field of information, computer and communications. These innovations fundamentally changed family life, reproduction, individual life choices, especially those of

women, the area of privacy, access to information, and the consumption of goods and services. These developments inevitably have an impact on the structure of social organisation, on economic relationships, and in general on customs and ways of living: they create new needs, but also new aspirations and new possibilities that span an individual's entire life and relationships, both public and private.

At the same time the myth of the stability and certainty of the law fades away: the rule of law becomes a flexible tool, changing when required by the rapidly evolving economic and social order.

So the seventies heralded in what has become known as the "age of rights", which is said to have been "the most intense burst of the recognition of rights that has ever been known."

Environmental law is usually included in this explosion of rights and indeed it is often regarded as the most significant and emblematic amongst the "new rights".

This inclusion is understandable, although not entirely correct.

In fact, like other legal disciplines emerging during this period, such as those concerning information technology and telecommunications, biotechnology and reproduction, or the rights of consumers, environmental law is written combining standards and legal instruments that belong to the more traditional legal disciplines of constitutional law, administrative law, European law, international law, private law and criminal law.

However, there are many other aspects that see environmental law as radically different from the "new rights." In fact, unlike the rights that emerged as a consequence of technological innovation, environmental rights have different origins, going further back in time: origins that cannot be ignored if one wants to understand the content and effects of the expansion of the environmental law.

It is too simplistic to incorporate environmental law solely into this "Age of Rights" era, regarding it as a phenomenon that started in the seventies, and ignoring the fact that its emergence is the result of a process that began long before.

The following sections focus on four characteristics of this process.

1. The far sighted legislators

"The law is the product of those few who understand the present reality and look far into the future" wrote the great nineteenth century German jurist, Rudolf von Jhering in *Law as a means to an end*, (a book still in print today); he continued with a somewhat authoritarian note, that the far sighted few have the task of dragging with them the many who only see what they have before their eyes. The law is seldom the product of the few who see far into the future. With very few exceptions, it is the product of interests and groups using their influence to achieve

immediate goals with the purpose of maintaining and increasing their positions of privilege and domination within a social order.

However, environmental law, although not in existence during Jhering's time, is closest to his vision of forward looking legislation.

Laws governing the environment during the past fifty years (along with human rights laws) have mainly been the preserve of those few who, at national and international level, had the ability and the courage to look ahead and pursue the general interest, often in opposition to short-term views .

There is a very good example of this clash between the long-term perspective of environmental legislation and short-term economic interests, where environmental legislation prevailed in containing the first global environmental crisis foreseen by scientists , namely the destruction of the ozone layer.

Freon, a substance containing chlorine, known more commonly by its technical abbreviation CFCs, synthesised in the thirties, was considered one of the greatest achievements of the chemical industry. Its impact was enormous: the way of living and of eating changed dramatically in the rich countries within a few years. The refrigerator became an essential appliance in every home: freezing allowed the storage and transportation of food over long distances. Freon was then used in air conditioning systems, making them safe and cheap; Freon's triumph came after the war, when it was used as a dispersant in spray cans. The production of spray cans in the US alone jumped from 188 million to three billion in the six years from 1968 to 1974, the year in which scientists realised that the chlorine released in the use of spray cans was entering the atmosphere and destroying the ozone layer. As the ozone layer protects the earth from ultraviolet radiation the consequences for the environment and for human health were potentially catastrophic. In 1977, just three years after the discovery, although still not fully proved, The United Nations Environment Program (UNEP), established a few years earlier promoted a plan of action for the protection of the ozone layer. The following year, the United States and Sweden, soon followed by others, prohibited the use of aerosol sprays using Freon. The Vienna Convention for the Protection of the Ozone Layer was adopted in 1985 with the aim of banning CFCs despite the fierce opposition of the producers, who insisted that there was no evidence to support Freon's role in the destruction of the ozone layer. Conclusive evidence was obtained in the same year, a few months after the signing of the Convention.

In this way, the far sightedness of environmental law prevailed over short term economic interests. The first serious environmental emergency produced by industrial development has been dealt with relatively quickly: it is estimated that by the end of this century the ozone layer will be almost completely repaired.

There are many more examples where environmental law looks to the future: the adoption of regulations to limit the reduction of biodiversity, to protect the whales and to avoid the extinction of many other species.

Success rates vary and the outcomes are not always as positive as has been the case with the prevention of the destruction of the ozone layer and the prevention of the extinction of whales. Far sighted legislation is dependent on predictions based on current scientific, biological and economic data, and this is often uncertain and imprecise in the light of further investigation. The Danish physicist Niels Bohr famously said that making predictions is difficult, especially when they concern the future. However, in most cases - in private life, in business, in politics - important decisions are often made based on partial data and uncertain knowledge: the economist Frank Knight emphasised that any decision involves "a leap into the unknown". "Perfect foresight" is an unattainable goal, especially when it concerns the long term future. Creating environmental law based on forecasts is extraordinarily difficult, because one has to overcome prejudices, vested interests, prospects for short term profits, and more importantly, convince the rulers and the public that in the long run the benefits will outweigh the immediate costs and that it is right to pursue the principle of intergenerational equity allowing future generations the same opportunities that are enjoyed by the present generation.

This is the case for all the regulatory measures aimed at curbing climate change and replacing the use of fossil fuels with other sources of renewable energy. Interventions are often not based on documented certainties, but on predictions - although formulated on the basis of in depth and wide ranging research and analysis widely shared by the scientific community. The current economic costs of climate change mitigation are set against the predicted costs of future economic damage. It is ultimately the ability, but also the need to look far ahead that determines the rise of environmental law as a new legal framework and characterises its content.

2 The end of nature.

If the first aspect concerns the future, the second aspect goes back into the past and looks at the changing relationship between man and nature in the course of the last century.

There have been changes of this kind at other times, as a direct and inevitable consequence of the prevailing, and largely unopposed view in the Western world that nature can be exploited by man and used for advancement and pleasure in whatever way he chooses. Taking two examples, think of the social and economic transformations achieved by the industrial revolution in the eighteenth century, and the devastating impact of colonial rule over much of the world in the next century.

However, it is only in the last decades of the nineteenth century that human activity causes the first substantial impact on the environment of a global nature, as a result of the global spread of industrialisation and trade. This is what many call the "first globalisation", induced by scientific and technological innovations in the fields of physics , mechanics , electronics and chemistry, and in the fields of transport and communications. This is also reflected in the literature of the time, for example in the novels of Jules Verne, in particular "around the world in 80 days", an impossible undertaking only a few decades earlier.

The previous changes caused by man always respected the teaching of Francis Bacon in the *Novum Organum*: man dominates and tames nature , but always obeys its laws.

Today, especially after the scientific discoveries of the last decades in the field of biology and genetic engineering, through which it became possible to modify living organisms, the relationship has changed : it is not man who obeys the laws of nature, instead man seeks to subject nature to his laws and his objectives.

Thus, while at one time man was subject to risks from nature, now a substantial and increasing risk depends on the decisions and activities of man. In this regard, the German philosopher Hans Jonas notes in *Das Prinzip Verantwortlichkeit*, one of the most important works on the effects of progress, knowledge and technological innovation in the twentieth century, that this is the era " of Prometheus unleashed, in which science has unprecedented strength and ceaselessly stimulates the economy ". He concludes that, for the first time, we should establish the principle of responsibility in that, unlike in the past, one should not do everything one is able to do.

It is precisely this difference that marks the end of the traditional idea of nature and the end of the myth of Eden, of an environment still untouched by civilisation. This idea does not survive the acquisitive human capacity to subjugate the whole planet to its control with disruptive effects on the climate, and a reduction in biodiversity. It is thus clear to see where environmental law diverges from the other "new rights": while they are, for the most part, the result of conquests created by technological innovation or the enlargement of knowledge, environmental legislation must override adverse reaction in the face of current emergencies, and a potentially grim future reality. It is mostly a " defensive " law whose objective is the containment and control of the assault on nature and on environmental and human health brought about by economic development.

3. A dwarf on the shoulders of giants.

The third aspect - connected to the one discussed above - is the fact that unlike any other legal discipline, and more clearly than all the other new rights, environmental law is not only made up of rules: one cannot properly understand this discipline without being able to place its laws in an economic, social, historic, and then more broadly, political context.

To paraphrase a metaphor usually attributed to Newton, but dating back to the twelfth century French philosopher Bernard of Chartres, we are like dwarves on the shoulders of giants. We see more and we see further than our predecessors, not because we have keener vision or greater height, but because we are lifted up and borne aloft on their gigantic stature. Our knowledge is greater because we have built on previous discoveries. This also explains the origin of the two criticisms so often levelled at environmental legislation: its abundance and its changeability. Some decades ago, one of the leading U.S. lawyers, Joseph Sax, noted that the overabundance of rules had swept away the opportunity to teach and learn this discipline.

This phenomenon, however, depends on the intrinsic characteristics of environmental law, which must comply with the incessant changes to its objectives, caused by three different factors.

a) Real changes resulting from technological innovations that require new measures to control their impact on the environment. A good example is offered by genetic technologies and the ability to use genetically modified organisms (GMOs) to create new plant species or modify the DNA of animals for specific purposes. In a few years there has been an intense production of rules at different levels (international and national) to regulate or prohibit, the new reality created by the use of GMOs in agriculture.

b) Changes or advances in our understanding of the effects of these technologies on the environment, resulting in the need for a constant review of the rules, or even with the adoption of entirely new regulations. The best example is again the case of climate change, where research and insights made during the last two decades have gradually modified and refined our perception of the phenomenon, highlighting aspects and problems hitherto unknown.

c) Changes in the behavior of institutions at national or international level. An example is offered by the so-called POPs (Persistent Organic Pollutants), harmful or toxic chemicals that are produced, sold and released into the environment.

Although the dangers of POPs have been known since the seventies, it was only with the Treaty of Stockholm on 21 May 2001 that the production, use and release into the environment of specific POPs was prohibited, or restricted.

4. Development

Finally, the fourth and perhaps most important aspect is the relationship between the environment and development.

It is impossible to understand the novelty and the evolution of environmental law without regard to the development of another new law that took shape in the preceding years: the right to development.

The relationship between the environment and development is the story of two interrelated themes in constant tension with one another. Two new rights have emerged, creating two legal disciplines, which finally rise to the level of two human rights. Let us briefly see how this evolved over time.

In the world emerging from the Second World War, the environment and the problems related to it were reduced to a discipline of marginal importance, mainly involving air pollution in cities. At national level, the environment does not exist as a fundamental value, neither is it dealt with in international law, where there are only conventions regarding the protection of nature for special scientific or recreational activities. Even the European community did not address environmental issues. The founding Treaty of 1957 did not introduce any reference to the environment among the subjects of community interest: the environment gradually received attention from the Commission and the European court of Justice merely in order to avoid competition distortion and not with the objective of protecting the environment as such.

The ideology of development dominated the landscape From WWII until the late sixties: "to develop a country must grow" was a common mantra. In 1972, two well-known environmentalists, William Nordhaus and James Tobin wrote: " Until ten years ago, economic growth was the primary goal of economic policy," In this vision of development the environment is nothing more than a container of raw materials to be used and transformed: thus , the General Agreement on Tariffs and trade (GATT) signed in 1947 between the rich countries had the goal of " full exploitation of the world's resources". The ideology of development was challenged in the mid- sixties and a divergence appeared between those within the wealthy industrialised countries who continued to support the ideology of development and economic growth, and those who brought to public attention the risks posed by the spread of uncontrolled industrialisation. Biologist Rachel Carson 's Silent Spring, published in 1962, marks the dawn of modern environmentalism. It quickly became a bestseller; it describes the expansion of the chemical industry, and the devastating effects of the uncontrolled use of pesticides on the environment.

At this time the rich countries were requesting strict rules as a means of avoiding damage to the environment caused by uncontrolled growth. Conversely in poor countries, where the promises of development had not yet materialized, the protection of the environment was considered a new tool of postcolonial politics.

To address this imbalance the first statement by the United Nations Conference on Trade and Development (UNCTAD) proclaimed in 1964, that the responsibility for the underdevelopment of poor countries lay with the rich countries (it was a first step in a path that lead, just over twenty years later, in 1986 to the claim of development as a human right).

The first World Conference on the Environment (United Nations Conference on Human Environment, UNCHE), held in Stockholm in 1972 occasioned the official clash on the international scene between environmental protection on one hand and development on the other, between industrialized and poor nations.

The conference hung in the balance until the last minute when a compromise between the opposing arguments was reached, and it was acknowledged for the first time that environment and development are two separate entities, but are not necessarily in opposition. However there was still a long way to go, with many arguments and misunderstandings.

Many years later in 1986, two events paved the way for the identification of a solution. In December 1986, the Declaration on the Right to Development adopted by the General Assembly of the United Nations proclaims (with only the United States voting against) that "the right to development is an inalienable human right as a result of which each man and all peoples are entitled to participate in and contribute to the economic, social, political and cultural environment in which all human rights and fundamental freedoms can be fully realised" (article 1.1 declaration on the right to development). Development, unlike in the past, is no longer a tool for growth, reduced to simple economic components, but a human right. On the other side there is still controversy whether the protection of the environment itself or its variants (the healthy environment. The minimum quality of the environment) can be considered as internationally recognized human rights.

In the same year a special commission, the World Commission on Environment and Development, also known as the Brundtland Commission, after the former Norwegian prime minister who chaired the meeting, made public the results of its work in the report, Our Common Future .

Development as defined in the report, "meets the needs of current generations without compromising the ability of future generations to meet their own needs." Above all the report famously linked poverty and the environment in one of its conclusions: "poverty produces environmental degradation and environmental degradation leads to poverty." .

So there is an acceptance of a link between poverty and underdevelopment, and the role of development in reducing poverty and preventing environmental degradation. Regarding the needs of future generations, it also officially introduced the principle of sustainable development, which in turn paved the way for a recognition internationally of the need for environmental protection, together with a recognition of the need for development. The principle has since been gradually established and became one of the cornerstones of international law and of Community legislation on the environment.

The principle is certainly inaccurate and ambiguous, but this is precisely the reason for the rapid consensus. This ambiguity has facilitated a flexible meeting ground between opposing sides,

between development and the environment. Marking this compromise, twenty years after the Stockholm conference, the United Nations Conference on Environment and Development (the Earth Summit) was called. It took place in Rio de Janeiro in June 1992 and was the largest international conference in history. The achievement of a link between development needs and the need to protect the environment was expressed by the official objective: "the establishment of strategies and measures to halt and reduce the effects of environmental degradation in the context of an effort at the national level and internationally, to promote sustainable and environmentally compatible development in all countries in the international community".

Following the Rio Conference the clash between environment and development was partially resolved, on the shifting ground of sustainable development, but only because, both in rich countries and in poor countries, the priority has been given to development - the wealthy countries to maintain their standard of living, the poor countries to attempt to approach those levels. Environmental protection, has depended on the varying effectiveness of environmental organisations.

The situation has changed as globalisation has gathered pace, since unlike in the past development for poor countries is a concrete reality and not simply a theoretical option. The fracture line is an implicit corollary to the principle of sustainable development: the principle of common but differentiated responsibility in tackling global environmental problems. It is a reasonable and acceptable principle if it provides that each state contributes in proportion to their economic and technological capacity. This principle becomes an impasse when applied to climate change: the poor countries – and also the emerging economies, such as China, India and Brazil, firmly maintain that the costs of climate change mitigation must be borne by the industrialized countries, who have been responsible for the changing of the climate since the Industrial Revolution and that any other solution would be incompatible with the right to development.

Despite two major environmental conferences subsequent to Rio - a decade later the World Summit on Sustainable Development (WSSD) in Johannesburg and twenty years on, the Rio + 20 conference back in Rio de Janeiro, there have been no effective interventions to prevent climate change

Reverting to the opening words of this chapter, the evolution of environmental law is strictly connected to the right to development. Much has changed since the days when the latter was reduced to mere economic growth. However, the choices concerning development and the way in which economic policy is used to promote growth remain key factors that influence and direct environmental policy choices, both at national and international levels.

Environmental law today.

In the years following the Rio Conference, much has changed in environmental law. At the state level environmental protection is not only the preserve of rich western countries: it is present as a fundamental value, or public interest in most of the constitutions in force today.

There is an overwhelming affirmation of environmental law on the international scene: there were few multilateral treaties (open to accession by all states) in the early seventies. Now there are several hundred.

Even more impressive is the growth in the number of treaties where accession is reserved for some countries to jointly solve common environmental problems: it is estimated that there are several thousand of those recorded today at the United Nations. Environmental law occupies a significant portion of the generation of rules at the transnational level: the European Union and similar organisations such as Mercosur, NAFTA, the OAU (Organisation of African Unity).

There are five mutually dependent factors that have contributed to this statement.

a) The appearance or worsening of global environmental emergencies: the destruction of the ozone layer, the reduction of biodiversity, the reduction of fish in the oceans due to overfishing and, above all, climate change.

b) The reduction and consolidation of the power of states on the international scene. Many skills, once regarded as the undisputed heritage of sovereignty, cannot be handled any longer exclusively at the national level: have been outsourced upward toward supranational levels and given to a variety of global regulatory regimes. As regards the environment, outsourcing has also been the result of a shrewd calculation: the choices and decisions can be economically and politically costly, hard to make and even more difficult to achieve due to the presence of conflicting sectoral interests. The development of industry, trade, tourism, housing needs, traffic and transport, agriculture, are all important public interests that, in one way or another, can be curtailed by the pursuit of environmental objectives. This means that decisions on environmental issues are difficult to champion for elected representatives with a short-term perspective, the few years of life of an electoral mandate, because it does not pay off in terms of votes and support. Better to suffer regulations imposed by supranational regulators, such as the European Union.

c) The presence of environmental organisations on the international scene (they are part of a group of so-called INGO, international non-governmental organisations): there were 17 in the early seventies, more than one hundred after the Rio conference and nearly 200 in 2008. Some of them - Greenpeace or WWF, to name but two - have millions of members and supporters and have financial resources greater than those of many states.

d) The propagation of knowledge. New information and communication technologies have led to the spread of a global network of interconnected organisations and pressure groups which interact with public authorities and often affect our choices.

e) Finally - and most importantly - economic globalisation together with the process of supranational integration, usually called global governance, have breached the barrier that previously separated the rich countries from the poor countries (although, the conflict between development and the environment has not disappeared, it has just taken different forms). We have seen that in a few years it is possible to emerge from underdevelopment: many countries traditionally included in the broad category of poor countries have reached the threshold of well-being and set themselves more and more as powers capable of competing globally with the rich countries: China , Brazil, India , Indonesia, in the first place and there are others that are following a similar path. At the same time the economic and financial crisis that has developed since 2008 has shown that it is also possible to fall out of the club of rich countries.

One thing that seems certain today is the degree of environmental protection depends directly on the level of economic and social welfare achieved. It is true that the different degrees of environmental protection depend on many factors: the history, culture and identity of each country and the communities that comprise it; policy choices and economic policy of a general nature related to public interests in various sectors (tourism, agriculture, industry, and so on); [finally, occasional circumstances, public policy, short-term contingencies of local character]. However, the standard of living generated by development remains by far the most important factor producing the adoption of rules that prevent the deterioration of the environment and the development of the means and structures for enforcing compliance and participation of the community in upholding environmental values.