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Ecological Interest as a Leading Rationale for Participation: Ecological Duties of the Citizens and of the Authorities

By *Giulia Parola*

Abstract

Our age is characterised by a global ecological crisis and humanity is both the cause and the victim of environmental degradation. The following contribution suggests the introduction of Ecological Duties at international and local level to modifying human behaviour towards environmentally benign practices. Law can be an important tool since it can create legal frameworks not just for environmental rights but also for ecological duties, which lead each individual as a citizen of social and ecological communities to become aware of the incredibly powerful role they can have in this crisis.

I. Introduction

States seem to progressively realise that they cannot create green societies on their own, but that they have to recognise a role for civil society in the process of achieving environmental objectives. Hence, achieving ecological aims requires a process of democratisation through participation, taking into account that economic transformations, scientific-technological progress and daily life changes will not be enough.

In most green political theories, citizens' participation in the environmental decision-making process is essential. In particular, stress is placed on the rights of access to information, participation and access to justice, as well as on democratic models.¹ Moreover, obligations *vis-à-vis* the planet and future generations are also emphasised.²

From this perspective, almost all the contributions in this volume deal mainly with the environmental citizen and her/his corresponding substantive and procedural environmental rights. My study will rather focus on the ecological duties that have not fully developed yet from a legal perspective.

¹ The starting point of all green political theories, in all their organisational and ideological diversity, concerns proposals of an alternative to the liberal-democratic representative system. Much work has explored the relationship between democracy and ecology: *Eckersley*, *The Green State*; *Mason*; *Howard*, p. 34; *Eckersley* *Ecofeminism*, p. 52; *Jananoff*, p. 2; *Parola*.

² *Melo-Escrihuela*, p. 113.

In fact, duties are easily conceptualised in ethical terms based upon arguments of political philosophy rather than upon legal terms. Nevertheless, the purpose of this article is to try to move on from this construction of duty towards a legal approach and for this reason it is useful to introduce the concept of the Ecological Interest.

For a long time, the primary task of the State has been to achieve and maintain the *common interest*. Hereunder fall the welfare of one State's population and the State's economic development. But since the humanity have to face the ecological crisis, it can be argued that a reference to *common interest* is as well comprising the survival of Earth and consequently of humankind as such. Thus, the Ecological interest is the interest of the survival of the Planet.

Moreover, the Ecological Interest includes two fundamental aspects: Ecological duties of the citizens towards the Planet as a continuum of responsible actions towards all forms of life, including non-human life and include not only the obligation to comply with environmental laws but also to participate; and Ecological duties of the Authorities (supra-national, national, regional or local) towards the Planet as a set of obligations to establish a new regulatory model for protecting all forms of life, including non-human life.

The legal doctrine has recently started to take into account this duty approach. An example is the article published by Boutonnet in June 2014³ on "*La consécration du concept d'obligation environnementale*". She introduces the concept of "*l'obligation environnementale*" that can be easily compared to the concept of 'Ecological Interest'. This concept "*désigne l'ensemble des devoirs destinés à intégrer la données environnementale soit dans une finalité de gestion du risque environnemental dans l'intérêt des parties ou du marché soit dans une finalité de protection de l'environnement dans l'intérêt collectif*".⁴

The following contribution has been divided into three parts: firstly it will be explained how participation in environmental matters can bring a new ecological awareness and responsibility; secondly it will be studied what the ecological duty is and a definition on the two principal ecological duties will be provided; finally, the contribution will be focused on the implementations of the ecological duties in the Aarhus Convention (AC)⁵ and in the Members States.

³ See also *Maljean-Dubois; Parance*, p. 647; *Jégouzo*, p. 1164.

⁴ Moreover, she divides the obligations in two categories, firstly there is "obligations environnementale subjectives [...] [qui] intègrent la donnée environnementale dans un souci premier de préservation des intérêts des sujets de droit", in other words when the environment is not directly protected, for instance the duty of the Authorities to give information to the public in environmental matters. On the other side there is "obligations environnementales objectives" that protect directly the environment, an example is the duty to protect the Nature.

⁵ Fully titled "The United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters".

II. Environmental Participation to an Ecological Responsibility

The most important role played by citizens and recognised by laws in environmental protection is participation in the decision-making process, which may be both political and administrative. The origin of public participation is “the right of those who may be affected, including foreign citizens and residents, to have a say in the determination of their environmental future”.⁶ Public participation processes have been emerging in the policies and environmental regulations of some States since the late 1960s and 1970s.⁷ This phenomenon coincided with political disturbances around the world when civil society started to ask for more democratic governance and environmental protection. From the period of the 1970s to the early 1980s, doctrine and critics have highlighted the importance of citizens to achieve economic development in an environmental manner.⁸ Consequently, during the 1990s, consultation and participation turned into the buzzwords of environmental decision-making, feeding into broader discourses on “good governance”⁹ “environmental justice” and “environmental citizenship”.¹⁰

Today the involvement of citizens in environmental decision-making processes has been realised in different regulations at international and local level. For instance, at international level the AC has recognised procedural environmental rights to the citizens.

An example at European level has been described by Nicola Below¹¹ in his article on European Regulation concerning the Registration, Evaluation, Authorization and Restriction of Chemicals¹² (REACH), where he explains the very diverse and elaborate participatory system based on REACH to show the efforts done in this sector of environmental legislation.

⁶ *Shelton*, Human rights and the environment, p. 26.

⁷ E.g., in UK, in its planning legislation of the 1960s. The creation of the Royal Commission on environmental Pollution, 1969, and the Department of the Environment, 1970, was the governmental response to these public pressures: *McCormick*, 1995.

⁸ *Spyke*, p. 263.

⁹ *Steffek/Nanz*.

¹⁰ *Richardson/Razzaque*, p. 168.

¹¹ *Participation under REACH – Stakeholder Interests and Implementation of EU Secondary Law (Nicola Below)*, in this volume, p. 131.

¹² Regulation (EC) no. 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) no. 793/93 and Commission Regulation (EC) no. 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC (Text with EEA relevance) (OJ L 396, 30.12.2006, p. 1 et seq.).

Then, concerning the national level, an interesting example has been illustrated by Julian Zwicker and Franziska Sperfeld.¹³ In his contribution, he provides an overview of an UfU-project.¹⁴ The project, called “Participation of environmental associations 2.0”¹⁵, aims to facilitate the co-operative work of environmental organisations in participation procedures by creating an online-tool that should help to communicate, exchange information and work on formal statements co-operatively.

An important improvement coming from public participation at any level is that more effective environmental protection through participation in decision-making might involve a change in individuals’ behaviour. Thus, this aspect of participation is more linked to process of awakening towards an ecological responsibility.

When we talk about participation and environmental participatory rights we can see also a duty to participate, nevertheless this approach is almost anthropocentric: in fact, according to Taylor¹⁶, the environment is only “protected as a consequence of, and to the extent necessary to meet, the need to protect human wellbeing. An environmental right thus subjugates all other needs, interests and values of nature to those of humanity. Environmental degradation or loss of ecological integrity as such is not a sufficient cause for complaint; it must be linked to human wellbeing”. Consequently, the individual has the right to initiate legal action and there is “no guarantee of its utilisation for the benefit of the environment, nor is there any recognition of nature as the victim of degradation”.¹⁷

Hence, environmental rights result in “creating a hierarchy” where humanity has a superior position, separate from other species of the Planet. Protection stems from human-centred environmental rights and so the actual state of the environment is determined by the needs of humanity, not the needs of other members of the natural community.¹⁸

Consequently, a need to integrate a new eco-centric approach is growing in legal theory.¹⁹ According to the ecological approach, when formulating an environmental human right humans should be viewed as a unit in the ecological system and one “should proceed on the basis that his environmental rights are qualified by the rights and interests of other affected sectors of the ecology”.²⁰

¹³ *Participation of Environmental Associations in the Context of Nature Conservation Law in Germany (Julian Zwicker/Franziska Sperfeld)*, in this volume, p. 117.

¹⁴ Unabhängiges Institut für Umweltfragen, in English: Independent Institute for Environmental Issues.

¹⁵ The project is called ‘Verbändebeteiligung 2.0’.

¹⁶ Taylor, p. 99.

¹⁷ Taylor, p. 99.

¹⁸ Bosselmann, p. 127.

¹⁹ Weiss, Intergenerational Equity, p. 205.

²⁰ Pathak, p. 223.

In fact, man does not enjoy a higher position on the tree of evolution over the rest of nature but “he is, indeed, merely a component equal with the other components of the ecological bio-system”²¹ and he does not hold a superior status but just a different kind of status which grants him responsibilities towards other species and the planet. Consequently, man has the duty to articulate and defend the rights of other occupants of the planet.

Entitlements to natural resources and a healthy environment, usefully expressed as rights, can be integrated by duties which respect and guarantee ecological boundaries. These duties can be expressed in ethical and legal terms as they define content and limitations of human rights.²²

Although the role of the citizen becomes in this perspective more important that does not mean that the role of the State and its duty to protect the ecological interest has been eliminated. Its role remains an exceptionally important focus because it can provide the legal and material support for further ecological democratisation which requires governmental policies to create the conditions and spaces for its exercise. In his contribution, Paolo Turrini scrutinised the role of the States and their obligations for example “to cooperate when dealing with transboundary or common resources – a duty that could easily be deemed to concern decision-making processes and so entail a corollary obligation to involve all the interest bearers”.²³

In conclusion, it may be said that the ecological approach to environmental rights has to acknowledge the interdependence of rights and duties, because as Cullet remarked “the only way to achieve an effective implementation of the rights is to lay a duty on the holders of the rights, to participate in the enhancement of the environment”.²⁴

III. Ecological Duties: Two Fundamental Duties

Traditionally, the duty-approach offers a subordinated prospective. According to a legal analysis, individuals have the general duty to respect the rights of others and to abstain from disobeying those social customs codified in laws.²⁵ Rights can subsequently be identified as the primary focus of attention since they stand logically prior to duties. Rights are also more tangible than duties since they benefit from a higher degree of public visibility, understanding, and support than a parallel dis-

²¹ Pathak, p. 205–206.

²² Bosselmann, p. 146.

²³ *Participatory Rights and the Notion of Interest in Environmental Decision-making: a Theoretical Sketch and Some International Legal Considerations (Paolo Turrini)*, in this volume, p. 57.

²⁴ Cullet, p. 25.

²⁵ Feinberg.

course of duties.²⁶ Nevertheless, the slogan ‘no rights without responsibilities’, coined during the French Revolution, is starting to take a new position in modern green political and legal thought.²⁷ Indeed, the other face of environmental rights presumes an active attitude on behalf of citizens, and even more, a citizens’ duty to protect the environment. Each person has the right to have his or her environment protected, but is also obliged to contribute to the common effort. Citizens are not passive beneficiaries, but share responsibilities on the formation of all community interests.²⁸

For this reason, some scholars have recognised that positive ecological duties often “flow from rights”²⁹. Habermas has suggested in another context to take the next step and establish a legal duty to make active use of democratic rights.³⁰ A rights-based approach could be used to specifically create legal duties for all decision-makers in relation to protection of the environment.³¹ The right would also entail the imposition of a duty to refrain from activities that harm the environment on individuals, organisations, and corporations.³² A duty has first to be laid upon all individuals as their combined actions can have a significant impact.

Moreover, it is worth noting that ecological duty has its background in the principle of ecological responsibility. Indeed, ecological responsibility is not a new topic: Jonas was one of the first scholars to propose this principle as a way to cope with the ecological problems generated by technological society.³³ In “*The Imperative of Responsibility*” Jonas revives the earlier ethics of virtue from ancient Greek philosophy, criticises human interactions with nature for being based solely on *techné*, observes that ethical principles have not kept up with technological changes, and proposes a new imperative: “Act in such a way that the consequences of your action are compatible with the permanence of genuine human life on Earth.”³⁴

Having clarified the origin and meaning of ecological responsibility, now it is useful to identify two kind of ecological duties: the first one is linked to the protection of the environment for the sake of the present and future generations and the second is the protection of the environment for the environment.

²⁶ *Feinberg*.

²⁷ *Weiss*, Intergenerational Equity.

²⁸ *Kiss*, p. 201.

²⁹ *Desgagne*, p. 263; *Weiss*, In Fairness to Future Generation, p. 45, who affirms “[p]lanetary rights and obligations are integrally linked and are in the first order collective obligations and collective rights. The rights are always associated with the obligations”.

³⁰ *Habermas*.

³¹ *Gormley*, p. 85; *Nickel*, p. 281.

³² *Nanda/Pring*, p. 475.

³³ *Jonas*, p. 36.

³⁴ *Jonas*, p. 36.

1. Duty to Protect the Environment for the Sake of the Present and Future Generations

Philosophy, religion, green political thought, and some legal traditions from diverse cultural traditions have already recognised that man is trustee or steward of the natural environment. From this arises man's duty to conserve the planet for present and future generations.³⁵ Nevertheless this recognition is not universal and almost all environmental theories note that there is a huge lack of intra-generational and inter-generational equity.³⁶

Intra-generational equity concerns the adequate consideration by political leaders in the developed countries vis-à-vis present generations living in developing countries. Intra-generational equity is narrowly linked to the footprint discourse, e.g. the inequity of the share of the planet's natural resources among members of the present generation. Thus, individuals who currently leave inordinately large ecological footprints are obliged to act by decreasing their consumption of earth's resources.³⁷

The inter-generational issue underlines that our responsibilities to future generations demand that we take a long-term perspective.³⁸ All decisions taken today will affect the quality of life for generations to come. Indeed, future peoples will suffer from the ways in which the environment is degraded and the extent to which the earth's resources are wasted.³⁹

Responsibilities vis-à-vis all members of our species exist, as it has been well theorised by Weiss in his essay titled *Fairness to Future Generations*.⁴⁰ The human holds Earth in trust for future generations. The principle of inter-generational equity forms the basis of a set of inter-generational obligations and rights, or planetary rights and obligations that are held by each generation. According to the author, "when we are born, we inherit a legacy from past generations to enjoy on the condition that we pass it on to future generations to enjoy".⁴¹

To sum up, there is an obligation borne by the present generation which involves the protection of the environment for future generations. Thus, each generation is both a custodian and a user of our common natural surroundings. As custodians of this planet, we have certain moral obligations to future generations which we can transform into legally enforceable norms.

³⁵ There are roots in the common and the civil law traditions, in Islamic law, (Islamic Principles for the Conservation of the Natural Environment, 13–14 (IUCN and Saudi Arabia 1983), in the Judeo-Christian tradition (*Locke*, p. 5) and in Asian non-theistic traditions such as Shintoism, Hinduism, Buddhism and Jainism (*Weiss*, In *Fairness to Future Generation*).

³⁶ See *supra* note 1.

³⁷ *Latta*, p. 377.

³⁸ *Weiss*, Conservation and Equity, p. 119.

³⁹ *Beckman*.

⁴⁰ *Weiss*, Conservation and Equity, p. 119.

⁴¹ *Weiss*, Conservation and Equity, p. 119.

2. Duty to Protect the Environment for the Sake of the Environment

Regarding the second duty, the Duty to Protect the Environment for the Environment, this obligation is reflected in the principle of sustainability which is “responsibility for the community of life”⁴².

The strong principle behind sustainability is the idea of human survival and maintenance of current conditions. It does not necessarily involve, for instance, restoration, revision, or reparation. It means that humans are entitled, for example, “to kill other species to provide for food or even to generate riches that aim at maintaining or warranting the survival of future generations. This counterfactual argument opens the door to other claims for justice and solidarity for those who cannot speak for themselves, so that the possibility of arguing for poverty alleviation, animal rights, ecological systems, biotic communities, and natural entities”⁴³.

Consequently, there is a necessity to recognise an obligation of man towards all non-human elements of the planet. The general principle which provides that an obligation arises only upon a correlative right cannot serve here inasmuch as non-human elements cannot be regarded as right-bearing.

Stone⁴⁴ has suggested that even if non-human, whether animate or inanimate, objects cannot be regarded as possessors of rights, they shall be treated as morally considerable. Moral consideration, he says, creates duties of man towards non-human animate and inanimate objects. The mere fact that “non-human things possess an intrinsic goodness, that is, goods in and of themselves, should be sufficient to attract duties”⁴⁵.

IV. The Implementation of the Ecological Duties in the Aarhus Convention and in the Members States’ Legal Systems

Ecological obligations are difficult to implement because they are almost always at the level of moral obligations despite the fact that they have progressed a few steps towards a transformation into legal duties. The strategy for a legal implementation could encompass the following components: first, codification of obligations; then, representation of future generations in decision-making processes and giving a voice to nature, in other words, giving the right to representation to nature.

⁴² *Bosselmann*.

⁴³ *Nascimento*.

⁴⁴ *Stone*, p. 56.

⁴⁵ *Pathak*, p. 225.

1. Implementation Through Codification

Moral responsibility *vis-à-vis* present and future generations and nature may be differently implemented in law, for instance through a codification. There are a number of ways of achieving this legal implementation. It has been suggested to use international agreements or regional legislations or constitutions, containing provisions for the protection of environmental rights. This could include solemn provisions creating collective and individual responsibilities for the protection and restoration of the ecological basis of all life.⁴⁶ The suggestion is not just the codification of ecological duties but also the development of particular regulations that may have the effects of influencing people to change their beliefs and, in turn, to act more sustainably.⁴⁷

a) Implementation in the AC

Concerning the implementation at International level, it is worth noting that, as also remarked by Claudia Sartoretti⁴⁸, from a legal point of view, the AC is an example of how ecological duties of the citizens and Authorities can be recognised and how it can become also a legal obligation.⁴⁹

In fact an example of ecological duties of the authorities can be found in art. 1 AC, that states:

“In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention”.

This provision underlines, unlike most multilateral environmental agreements which cover obligations that Parties have to each other, that the AC imposes a clear obligation on its parties and public authorities towards the ‘public’, as far as access to information, public participation and access to justice are concerned.⁵⁰ In the same way this aspect has been observed by Federica Cittadino: “In the Aarhus

⁴⁶ Barresi, p. 3.

⁴⁷ Davis; Geisinger, p. 35.

⁴⁸ *The Aarhus Convention between Protection of Human Rights and Protection of the Environment (Claudia Sartoretti)*, in this volume, p. 43: “[i]n essence, the environmental protection is eventually dealt with in the same way as any other human right. In this way the Aarhus Convention appears as a typical reflection of our civil societies, which are based on the main idea of equal rights for everybody. In fact, for the first time an international agreement codifies a right to environment and, at the same time, recognizes a correlated duty to protect natural resources.”

⁴⁹ The Preamble of the AC recognises that “every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and *improve* the environment for the benefit of present and future generations”.

⁵⁰ *Stechl-Casey-Lefkowitz*, p. 1.

Convention, participation is conceived both as a means to realise the right ‘of every person’ to enjoy a satisfactory level of environmental protection and as a prerequisite for States to be able to fulfil their duty to protect the environment. Not only are rights granted to individuals and to the public, but the Convention also spells out corresponding obligations for States to establish an adequate legal framework in order to achieve the Convention’s objectives”.⁵¹

Thus, it is up to the state to provide for the necessary administrative, legal and practical structures, which shall guarantee the basic three rights, covered by the Convention. This represents a new approach to the role of the State. Instead of solving ecological problems itself, the State acts as a sort of referee in a process involving larger social forces, leading to a more organic and complete result.

Moreover AC is “the first international legal instrument to provide a set of legal obligations”, according to the Implementation Guide, the duties are principally *vis-à-vis* the future generations than *vis-à-vis* the Environment itself.⁵² This can also be seen in Preamble to the AC, where participatory rights are extended to citizens, and it is acknowledged that the citizens have an obligation to future generations. In other words, the impact of present activities on the well-being of future generations must be taken into consideration.⁵³ In addition, paragraph 5 of the preamble affirms “the need to protect, preserve and improve the state of the environment and to ensure sustainable and environmentally sound development”.

In the context of the AC, the aforementioned statements establish that procedural rights are not only important for the realisation of the substantive right to a healthy environment, but they also have a role to play in the fulfilment of ecological duties by helping to “protect, preserve and improve the state of the environment”.⁵⁴

This principle is better specified in the second part of paragraph 7 of the preamble, which states that: “every person has [...] the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations”.

In which way the duties of protection, preservation and improvement affect the state of the environment is unclear. The first two words imply that environmental damage or degradation should be prevented while the verb ‘improve’ appears to indicate that damage that has already been done should be repaired and the environment restored or renewed. The emphasis on ‘protection’ and ‘renewal’ rather than

⁵¹ *Public Interest to Environmental Protection and Indigenous Peoples’ Rights: Procedural Rights to Participation and Substantive Guarantees (Federica Cittadino)*, in this volume, p. 73.

⁵² *Stec/Casey-Lefkowitz*, p. 29.

⁵³ *Stec/Casey-Lefkowitz*, p. 29.

⁵⁴ *Stec/Casey-Lefkowitz*, p. 16.

the ‘substitution’ of man-made for natural resources means that ‘substitution’ is not an option.⁵⁵

These paragraphs lay out the basis for the connection between public participation and basic human rights, the right to a healthy environment, as well as the duty to protect the environment for the benefit of present and future generations. In particular, paragraph 8 declares: “Considering that, to be able to assert this right and observe this duty, citizens must have access to information, be entitled to participate in decision-making and have access to justice in environmental matters”.

b) Implementation in Member States’ Legislation

Concerning the implementation of the ecological duties of the Authorities in Germany and Italy, there are some examples of codification. In particular Germany, as it has been explained by Cristina Fraenkel-Haeberle in her article⁵⁶: “Art. 20a *Grundgesetz* (Basic Law) in Germany, which safeguards natural resources, introduced in 1994, has the status of a programmatic norm (*Staatszielbestimmung*) which does not contemplate an enforceable right of private citizens, but nevertheless limits the powers of the state, as a basic principle, to act conforming to it by legislative, executive and judicial authorities, is a case in point. The norm assigns to all state authorities (Federation and *Länder*) the task of ‘safeguarding natural resources including assuming responsibility towards future generations and animals within the framework of the constitutional order’.” Moreover Cristina Fraenkel-Haeberle explains that in 2006 a draft law was presented to the German Bundestag which aimed to introduce the concept of ‘justice from one generation to the next’ in the Basic Law, “aiming thereby to ensure an equitable distribution of resources regarding future generations too, bearing clearly in mind that environmental protection, above all regarding the climate, requires a long-term approach that goes beyond the narrow time limits of political office”. This proposal “sought to extend the promise made to future generations to questions dealing with economic (especially financial) policy so as to afford the legislator sufficient room for manoeuvre instead of letting the future generations be crushed by an overwhelming public debt and left with an under-financed social and pension system”.

German doctrine interestingly suggested implementing an ecological duty, using the principle of proportionality in an environmental sense. Cristina Fraenkel-Haeberle explains that “the proposal was made to insert a ‘contrat naturel’ between humanity and nature in the ‘contrat social’ between individual and society. Proportionality in the ecological sense was interpreted in this perspective as the equilibrium between financial costs and ecological advantages. So it was envisaged extending a principle previously used for state intervention limiting citizens’ rights to human be-

⁵⁵ Dobson, p. 45–46.

⁵⁶ *Participatory Democracy and the Global Approach in Environmental Legislation* (Cristina Fraenkel-Haeberle), in this volume, p. 31.

haviour that impacts on the world of nature. Both cases entail a limitation to authority, to the state in the first case regarding society and, in the second case, to society regarding nature”.

In the Italian Constitution there are not direct references to the ecological duties as Viviana Molaschi has noted, but it is possible to interpret Art. 2 of the Constitution in this sense: “Art. 2, not only recognises and guarantees the inviolable human rights, but expects that the fundamental duties of political, economic and social solidarity be fulfilled”⁵⁷. The duty of solidarity enshrined in this article, which can be referred also to the environment, can justify that the subjects of the legal system can be charged with a duty of environmental protection.”

2. Implementation Through Representation of Future Generations and of Nature

Concerning future generations, democratic governments have been under extensive criticism for not adequately taking the interest of the unborn into account. In fact, political participation in democracies includes only living people, leaving the “unborn without a voice”.⁵⁸ Also, the World Commission on Environment and Development reported that “future generations do not vote; they have no political or financial power; they cannot challenge our decisions”⁵⁹. Hence, it is ultimately important for the development of a legislative mechanism to represent future generations, especially since the decisions that the individual and government make today will determine the initial welfare of future generations.⁶⁰

Regarding the implementation through Representation of the Nature it is important to introduce the concept of nature’s rights which has been well documented in 1972, following the publication of Stone’s article “*Should trees have Standing?*”⁶¹. For almost forty years the concept has been debated amongst lawyers, philosophers, theologians, and sociologists. This debate has led to an advocacy of a wide variety of rights approaches including legally enforceable rights for nature as envisaged by

⁵⁷ *The Implementation of the Aarhus Convention in Italy: a Strong ‘Vision’ and a Weak ‘Voice’* (Viviana Molaschi), in this volume, p. 103.

⁵⁸ The reasons to give voice to the unborn and to future generations are explained by Shelton, *Human Rights, Environmental Rights*, p. 110: “[a] depleted environment harms not only present generations, but future generations of humanity as well. First, an extinct species and whatever benefits it would have brought to the environment are lost forever. Second, economic, social, and cultural rights cannot be enjoyed in a world where resources are inadequate due to the waste of irresponsible prior generations. Third, the very survival of future generations may be jeopardised by sufficiently serious environmental problems.”

⁵⁹ World Commission on Environment and Development, *Our common future*, 1987; see also Beckman.

⁶⁰ Weiss, *Conservation and Equity*, p. 272.

⁶¹ Stone, p. 450.

Stone.⁶² The point they have in common is an attempt to give concrete and meaningful recognition to the intrinsic value of nature.

Stone himself recognises the limitations of his 'rights' theory and in the final pages of his article discusses the importance of a changed environmental consciousness. He states that legal reform, together with attendant social reform, will be insufficient without a "radical shift in our feeling about 'our' place in the rest of Nature". Stone has never considered 'rights' as an end in themselves but rather as a means to an end.

In fact a final step towards a thorough protection of nature is taken when rights are attributed to the environment itself. Many configurations are possible, depending on which representation of nature merges with law to forge answers to the questions of personality and legal standing. Sophisticated ideas have been proposed, ranging from the rights of big apes to those of ecosystems. Although some maintain that this right can be conceived only in objective terms – that is, a minimum standard of protection to shield nature with – some think that a subjective element may be envisaged. Given the obvious impossibility for nature to assert its own rights in front of a judge, to take them seriously, thus justifying the use of the word 'right', would mean to concede this capacity to human representatives. Thus the environment cannot enforce its rights itself and needs someone to intercede on its behalf.

a) Art. 9 (3) AC, the Fourth Pillar

Representation of future generations and Nature can be realised granting standing to citizens or state authorities to intervene in proceedings before national courts and administrative bodies, and state or provincial courts.

Art. 9 (3) AC is moving in this direction when it creates an additional category of cases, where citizens represent the interest of future generations and Nature, because they have access to administrative or judicial procedures to challenge acts and omissions, whether or not these are related to the information and public participation rights, by private persons and public authorities which contravene national law relating to the environment.

Art. 9 (3) AC recognises the significance of the public enforcement of environmental law by providing for direct action against polluters or regulators and this suggests a continued 'monitoring' type role for the public.⁶³

Hence, this provision from an idealistic point of view is quite a big *revolution* in the field of environmental law enforcement and thus it might be considered a fourth pillar.⁶⁴ Direct citizen enforcement, as a model of a *citizen suit*, has been initiated to

⁶² Stone, p. 450.

⁶³ Lee/Abbot, p. 101.

⁶⁴ Parola.

develop throughout Europe, though. An overview about this article and the German implementation has been offered in Angela Schwerdtfeger's contribution.⁶⁵

Thus, this 'fourth pillar' in the AC clarifies that it is not only the purpose of environmental authorities and public prosecutors to enforce environmental law, but that the public plays a role as well, to fulfil the environmental duty to conserve and protect the environment for future generations and for the environment itself.

b) Implementation in Member States' Legislation

Some authors, and also the World Commission on Environment and Development,⁶⁶ suggest implementation through representation by setting up an *ombudsman* for future generations and for Nature. This institution could take a step towards ensuring that the interests of future generations and Nature are considered either "by giving standing to a representative of future generations (and Nature) in judicial or administrative proceedings or by appointing and publicly financing an office charged with ensuring that positive laws conserving our resources are observed, with investigating complaints of abuse, and with providing warnings of pending problems".⁶⁷

A very interesting example of *ombudsman* for Future Generations and of Nature at national level can be found in Ulrike Giera's contribution, where she describes the Austrian institution of the Ombudsman for the Environment (*Umweltanwalt*).⁶⁸ This institution is "not a private person who acts as an attorney for the environment, but rather a governmental organisation". Moreover, "[a] study carried out for the European Commission found that in all Member States, the Austrian institution of an Ombudsman for the Environment comes closest to Stone's idea. Through the Ombudsman the environment gains standing in various proceedings. As a guardian for the environment, the Ombudsman is entitled to claim environmental issues in administrative proceedings and defend the interests of the environment".

Another interesting duty of the Ombudsman is to provide information, support and counselling for individuals. Ulrike Giera explains that "in this respect the Ombudsman for the Environment is not only an attorney for the environment, but also an attorney for citizens regarding environmental matters. Individuals, municipalities or groups of persons can file complaints or applications concerning environmental issues with the Ombudsman. A person who is affected by an environmental issue or who has knowledge of an environmental nuisance can address his/her concerns to

⁶⁵ *Implementation and the Separation of Powers* (Angela Schwerdtfeger), in this volume, p. 169.

⁶⁶ *World Commission on Environment and Development*.

⁶⁷ Weiss, Conservation and Equity, p. 272; Weiss, Intergenerational Equity, p. 25; Westra.

⁶⁸ *Attorneys for the Environment – an Effective Implementation of Art. 9 (3) Aarhus Convention?* (Ulrike Giera), in this volume, p. 215.

the Ombudsman for the Environment, who then decides whether or not to take action within his/her competence”.

However, without a doubt, concerning the implementation of art. 9 (3) AC, the Ombudsman for the Environment is one measure to implement the AC and in particular the duty to protect the environment expanding the narrow access to justice to some extent by participating in administrative and court proceedings and by taking on the claims of individuals.

V. Conclusion

In conclusion, in many cultures individuals have duties and responsibilities towards others and the wider community, thus the focus of environmental law can no longer be entirely anthropocentric; a shift towards an eco-centric approach is necessary which takes into account the interests of human beings, individual non-humans and the environment as a whole. The shift towards an eco-centric approach would allow defining and shaping the ecological duties of the citizens and of the authorities towards the Planet.

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