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THE RIGHT OF ACCESS TO ENVIRONMENTAL INFORMATION WITHIN THE CONCEPT OF HUMAN RIGHTS AND ENVIRONMENTAL POLICY

Summary

In this paper, the authors discuss the development of the environmental rights of citizens, in the context of human rights. The authors also discuss the theoretical assumptions and the importance of environmental law as well as the connection between environmental and modern environmental policy. Also, the authors explain the key elements of environmental law, and the degree of the EU standards in this field and the possibility of their application in the acceding countries. Special attention was paid to the importance of environmental law in a democratic system. Therefore, the authors consider environmental law from two perspectives - as a way to improve environmental protection and improvement of environmental policy on the one hand, but also as a way to influence and control power on the other hand, according to the reached European standards.

Key words: environmental policy, environmental law, human rights

1. THE LINK BETWEEN HUMAN AND ENVIRONMENTAL RIGHTS

Like human rights, environmental law touches upon all spheres of human activity. Quite obviously, human rights and the environment are closely related. But how close? Is the environment a mere good or value to be added to the list of individual demands or is it a condition of life, therefore requiring limitations to individual freedom? Personally, we upheld the view that the environment is an independent value that needs strict protection as other commonly agreed values, such as the right to property or the right to life and health. However, as in theory opinions as to this question are divided, we shall, in this chapter, analyze both.

We are strongly of the opinion that the right to environment must be classified as a human right of the third generation.[1)] Insofar such a qualification, according to some opinions must be classified as controversial; we are of the opinion that development of all rights of the third generation will urge further development of international law – particularly the general body of human rights – as well as international relations in its whole. Generally speaking, the abovementioned rights are neither guaranteed nor are they generally speaking ascertained, but are solely proclaimed as such. Nonetheless, such a proclamation is to be valued as very important from the lawgiving/political point of view, because it is a first step in the right direction.[2)] As subjects to the rights of 3rd generation large groups of people are considered, but also all individuals in some state or in an international community, whereas under an object diverse public goods on an international or national level are considered.[3)]

1) According to Maddex "environmental rights represent a subset of collective human rights, which are the third- generation rights…", see Maddex, Robert L.: "International Encyclopedia of Human Rights- freedoms, abuses and remedies"; CQ Press; Washington D.C.; 2000; p. 124; Sieghart, P.: "The International Law of Human Rights"; Clarendon Press, Oxford; 1990; p. 376; Vucinic, Nebojsa: "Basis of Human Rights and Freedoms" (original title: "Osnovi ljudskih prava I sloboda"), Podgorica, CID; 2001; p. 198.

2) Rakic-Vodinelic, Vesna: "Rights of the Third Generation" (original title: "Prava treće generacije"), Belgrade; 1989; p. 796.

3) Lyons, Gene M.; Mayall, James: "International Human Rights in the 21st Century- Protecting the Rights of Groups"; Rowman & Littlefield Publishres; Lanham- Boulder- New York- Oxford; p. 3-20; Vucinic, N.: "Basis of Human Rights and Freedoms" (original title: "Osnovi ljudskih prava i sloboda"), Podgorica, CID; 2001; p. 180-196.

2. THE STATUS OF ENVIRONMENTAL RIGHTS WITHIN HUMAN RIGHTS INSTRUMENTS

Except the two regional instruments for the protection of human rights[4] there are no express statements of environmental rights on the international level.[5] The closest link to the right of the environment is in the Convention on the Rights of the Child, linking environmental pollution with health risks[6]. In this place we ought to mention the Stockholm Declaration also,[7] as the first international document in which right to the environment was mentioned as a human right expressly, but also as a prerequisite to other human rights. In the Declaration abovementioned it is emphasized that "a human being has the right to liberty, equality, and adequate environmental conditions, in an environment which quality enables life in dignity and welfare, and a solemn obligation to protect and improve this environment for the generation living now, and future generations". As a difference to the Stockholm Declaration the Rio de Janeiro Declaration[8] is a step backwards regarding the forming of this right as a legal human right, because it does not use the term "legal" and is not dedicated to the problems of the relations between the international law and the protection of the environment from the legal point of view, but, nevertheless it very firmly upholds the idea of sustainable development "human beings are at the center of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with the nature". However, as mentioned before, here are some other international legal documents, which work on the topic of environmental rights with great care. The African Charter, for example, in Article 24 says: "all peoples have the right to a universally satisfying environment that promotes their development".

4) African Charter on Human Rights and People's Rights, Organization of African Unity (OAU) Doc. CAB/LEG/67/3/Rov. 5 (1982) and Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (1989).

5) One of the reasons for this could be the fear of additional numerous claims that would devalue or debase the human rights currency. See Schelton, D.:"The Right to Environment"- Eide, A.; Helgesen, J. (Edit.): "The future of human rights protection in a changing world"; Oslo, Norwegian University Press; 1991; p. 198.

6) United Nations Convention on the Right of the Child, Un General Assembly resolution 44/25 of 20 November; 1989; A/RES/44/25.

7) United Nations Declaration on the Protection of the Environment; Stockholm; 1972.

8) Declaration on Environment and Development; United Nations Conference on Environment and Development; Rio de Janeiro; 1992.

3. ENVIRONMENTAL PROCEDURAL RIGHTS AS A MEANS OF ENVIRONMENTAL PROTECTION WITHIN THE SOCIAL COMMUNITY

By the development of technique and technology, day-to-day, the challenge of using and sustaining environmental capacities to generate a continuous flow of resources and services becomes more and more difficult. The globalization of human activities and work brought us to the era of co-evolution of the ecological, social and economic sectors, as well on the national as on the global level.

In theory there was quite a discussion about the interface between the society and the environment. Duncan is of the opinion that human society is characterized by the degree of technology and its organization.[9)] This leads to a quadrilateral rather than a bilateral relationship between man and his environment: population – organization – technology – environment. Hawley also is basing his theory on four variables, but according to him are organization and technology "lenses" that mediates the relation between the society and environment.[10)] The more contemporary literature even further upholds these two classical understandings, but the very comprehension of technology moves more and more into the direction of an external variable, giving to institutions rather than to organization the significance in the mediating process between society and the environment.[11)] The environment may be characterized as a common property, which does not mean simultaneously "no property right" as a cultural artifact, socially constructed and contested. Because of that, the right to government, using and possessing has every man as an individual and as a member of the broader human society. The best results in guarding the environment will be achieved if the process is formed as cooperation between authorities and the broader public, which may be given the name "comanagement".[12)] The very essence is in the institutionalized solving of problems, which is achieved by better harmonizing private and collective interests and rights. In the system of "co-management" the citizen will have a much greater role and possibility to gain more insight into the so much needed

9) Duncan, O.D.: "From Social System to Ecosystem", Sociological Inquiry 31, 1961; p. 140-149.

10) Hawley, A.H.:"Ecology and Population", Science 179, 1973; p. 1196-1201.

11) Ostrom, E.:"Governing the Commons:The Evaluation of Institutions for Collective Action", New York, Cambridge University Press, 1990.

12) Hanna, Sussan S.; Folke, Carl; Möler, Karl- Göran: "Rights to nature", Island Press, Washington D.C., 1996; page 87-101.

information, and the society as a whole will have more profit because of that role, because who has better insight into the problems and needs of the environment than the very people who live there?

After quotations given in connection to the relation between environmental right and its protection, it is clear that these rights were acknowledged to man with the aim to ensure the basic conditions of living, work and development, and it is very logical to give him a more active role in all activities, which are connected to the environment. Naturally, we are well aware that the conditions of functionality of modern societies and states because of its proportions and complexities demand more and more indirect action by individuals, but expressly because of that his role must contain also the components of the control mechanism in relation to those which are executives in the environmental policy and in the environmental law-giving.

This aspect of the so-called decentralized control (the way in which it was defined by the EU Commission) consists in strengthening and using of interests of individuals in aiming at carrying out the rights (in our case environmental law) of the European Union.[13] On the other side, the control mechanism must be under aegis of the citizens and public administration regarding the activities of the economic/business sector, which quite naturally are classified into the category of potentially big polluters. In such a way, the care of the environment became the common "business" of the users and the administration.

The position of the widest public and individual citizen regarding implementing and protecting of environmental right in the European Union was strengthened by giving to their disposal manifold instruments of environmental laws, like: freedom of access to environmental information.

3.1. Right of access to environmental information

The right to access to information is considered first in time among the procedural rights because effective public participation in decisionmaking depends on full, accurate, up to date information.[14] In general, access to information as well as legislation related to this issue can be of two types: (1) applicable to all information in the hands of public authorities; or (2) specifically limited to environmental information. A number of European states have legislation of the first type,

13) Wegener, Bernhard, W.: "Rechte des Einzelnen", Baden-Baden, Nomos Verlg.- Ges., 1998, 1. Aufl.; p. 17-26.

14) Stec, S.; Casey-Lfkowitz, S.: "Aarhus Convention: The Implementation Guide", United Nations, New York and Geneva, 2000; p. 49-53.

for example Sweden, the Netherlands, Denmark, France,[15] and in some states there are also constitutional provisions concerning the right of access to information.[16]

In order for citizen to generally be able to protect its environment, and to enjoy his right to the healthy environment, it must have adequate and prompt information connected to the state of the abovementioned at its disposal. Only, and only a well-informed public may exert control, and be a downright real partner to the authorities in the putting into effect the highest standards of the environmental policies.[17] Accordingly, access to information is considered to be at the heart of sound environmental protection and sustainable development. It enables citizens to obtain information about the state of the environment and human health, factors affecting or potentially affecting the environment such pollution, proposed projects that could impact on the environment, laws, policies and international agreements potentially affecting the environment as well as learning about threats to the environment and how to respond to them.[18]

On the European Union level the Directive 2003/4/EC on Public Access to Environmental Information entered into force and replaced the Directive 90/313/EEC,[19] based on ideas and decrees of the Aarhus Convention. As well as the Aarhus Convention, the Directive guarantees to every natural and legal person free access to environmental information, which is known to authorities or other subjects of private law, and that right, may be exercised without any legal claim. In Article 3, paragraph 2(a) it is stated that authorities are obliged to answer within a month delay to the submitted demand, and only exceptionally after a two months delay. Based on Article 6, Paragraph 1, any person which claims that the demand was unjustly rejected, or was not even dealt with, or has gotten from authorities in charge an inadequate answer "has access to a procedure in which the acts or omissions of the public authorities concerned can be reconsidered by that or another public aut-

15) For more details see: Hallo, Ralph E.: "Access to Environmental Information in Europe"; Kluwer Law International, London- The Hague- Boston; 1996.

16) Such countries are for example Greece and Portugal. As a rule, such constitutional provisions require legislation or regulations to activate the right they guarantee. Without such secondary legislation, the constitutional provisions are seldom of practical effect. For more details see also: Hallo, Ralph E.: "Access to Environmental Information in Europe"; Kluwer Law International, London- The Hague- Boston; 1996.

17) Sands, Philippe: "European community environmental law: legislation, European Court of Justice and common-interest groups", in: The modern law review; vol. 53, 1990; p. 685-698.

18) Bruch, Carl: "Regional Opportunities for Improving Environmental Governance through Access toInformation, Public Participation and Access to Justice"; April 2000.

19) Directive 90/313/EEC, OJ. (1990) L 158/56.

hority or reviewed administratively by an independent and impartial body established by law".

Contrary to the possibility of getting environmental information on request, environmental information may be received by the way of the socalled system of reporting. The European Union in its practice is putting into effect a system of reporting, which starts with quite ordinary announcements which are submitted to the European Commission in connection with the harmonization of national law and regulations of the Union, till the regular submitting of information to the widest public,[20] which enables it to exert control and gives it the possibility to have insight into the EU environmental legislation of every single member state. Up to now all member states were obliged, in specified time periods to make public reports on the state of the environment (in Germany, federal government was obliged to make a report every fourth year[21]). Directive 2003/4/EC obliges the member states and respective authorities for a still more intensive reporting of information by means of computer/telecommunication/electronic media (Article 7, Paragraph 1[22]). The obligation to report every fourth year is now a supplement to all other data, which must be made public only.

3.2. Right of public participation in decision-making on environmental issues

The role of the public in decision-making is one of the principal questions in the philosophical, political and law theories from the dawn of modern civilization. All discussions relating to the organization of the state basically spin about the question how to organize authority in the most rational way, i.e. how to enable the citizen to be an efficient participant in the process of law enforcement, and dealing with questions which are important to him. This is not exclusively a question of democracy and of upholding human rights – this question has a very important economical aspect – such a way of governing the state is more rational and more efficient than others.

Participating of the general public in the decision-making is the central question of the Aarhus Convention; parts of the Convention dealing with access to information and judicial protection are directly and

20) Wegener, Bernhard, W.: "Rechte des Einzelnen", Baden-Baden, Nomos Verlg.- Ges., 1998, 1. Aufl.; p. 37.

21) In Germany this obligation is prescribed in Art. 11 UIG, see Thomas Schomerus/Christian Schrader/Bernhard Wegener: "Umweltinformationsgesetz", Kommentar, Art. 11, 2. Auflage, Baden-Baden 2002.

22) Schrader, Christian: "Neue Umweltinformationsgesetze durch die Richtlinie 2003/4/EG", Zeitschrift für Umweltrecht (ZUR), No. 3, 2004; p. 134.

functionally connected to upholding the right of the general public in decision-making. The Convention generally regulates this question by relatively dividing regulations affecting three groups of decisions: decisions about special activities (cited in Article 6, and in detail numbered in the appendix I of the Convention), decisions about planning, programming and policies in the domain of the environment (Article 7), and decisions about participating in the preparation of executive regulations and/or generally applicable law-giving normative instruments (Article 8). The list of special activities from Appendix I is partially identical with the list of objects and works for which an estimate of its influence on the environment is obligatory, according to Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment.[23] On the level of the European Union the participation of the general public is regulated by the Directive 96/61/EC concerning integrated pollution prevention and control[24] and the Flora- Fauna Directive.[25]

3.3. Environmental impact assessment

The purpose of environmental impact assessment (EIA) is to identify any significant environmental effects as a major development project and to design any mitigation measures necessary to reduce or remedy those effects.[26] Environmental impact assessment has to be applied before major decisions are taken and when all alternatives are still open, integrate all environmental considerations and safeguards into all phases of project design, construction and operation. Of course, from the very beginning the widest public has to be involved, consulted and provided with sufficient and timely information on all stages of decision-making, including final approval and the establishment of conditions for project implementation.[27]

The participants of EIA are all those who are directly or indirectly "hit" with a certain proposal, all those who are interested for the

23) European Council Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment OJ. L 175 , 05/07/1985; p. 0040 – 0048.

24) European Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control; OJ. L 25 , 10/10/1996; p. 0026 – 0040.

25) European Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora, of 21 May 1992; OJ. L 206 , 22/07/1992; p. 0007 – 0050.

26) Miazga, Agata; Dusik, Juri; Sadler, Barry: "Environmental Imapct Assessment Training Resource Manual for South and Eastern Europe"; Szentendre, Hungary; Regional Environemntal Center for Central and Eastern Europe, 2003; p. 8-11.

27) Krämer , Ludwig: "Focus on European Environmental Law", 1997; London, Sweet& Maxwell (Edit.); p. 129-130.

proposal (NGO, experts, private sector…) proponents and project beneficiaries, as well as public authorities who are in charge for proposals given, or have a certain political interest connected to it. As the most important public roles in the process of influence assessment we may determine: take account of views and concerns of key stockholders, ensure that important impacts are not overlooked, reducing conflicts throughout the early identification of contentious issues, improve transparency and increase public confidence in the EIA processes. Inclusion of the general public into the process will allow it to be divided into four levels: the very informing of the general public, its consultation, active participation, and negotiating with the general public.

On the level of the European Union this process was initially regulated by the Directive about the assessment of influence on the environment from the middle of the year 1985 (following amendments introduced by Directive 2003/35/EC), aforementioned. This Directive is binding the member states by the realization of every project, which project according to its nature, its dimensions or place of realization may lead to significant degradation of the environment, to carry out an assessment about such effects. The Directive regulates the obligation about adequate and timely information of the general public about such effects, as well as about possible exceptions and the application of EIA on individual projects and reasons for that (Article 2, Paragraph 2). The general public must have the opportunity to bring forth an opinion connected to the realization of the project, the general public must be consulted before the final decision is brought forth: after the estimate is made, the general public must be informed about the EIA decision (permit), as well as conditions and reasons which were essential in its making (Article 9).

3.4. The right of access to justice in relation to environmental issues

Environmental rights (before and above all to environmental information and right to public participation concerning environmental matters) would have no sense at all if there would be no judicial possibilities for citizens or citizen organizations to bring legal action for the protection of such rights in the case of injury. The access to justice in environmental issues is one of the top priority questions of the international agenda, and more and more its importance is emphasized which underlines the interest of the general public in the preservation of its environment. This aim would have been best attained by a cooperation of all sectors of the society and the government. When the citizens fight for environmental justice for access to the right for information or the

right to be a party in the decision-making, they increase their ability to such new-acquired mechanisms for use in other domains.

The focusing on questions of justice in the frame of international environmental law is an index of the role of environmental protection in empowering people and making authorities more accountable. The relationship between access to justice and good governing practice toward sustainable development becomes more evident. Whereas realization that the protection of the environment and the over-all development are mutually coupled and interconnected is of long standing,[28] the connection between access to the justice and the government is quite recent. This is still another proof of the specific character of the international law[29] and its applicability on even other regions of the national and international law, especially in the context of human rights, of sustainable development and integration equity. The Aarhus Convention deals with the access to justice in quite a detailed way but before it was brought forth in the framework of the environmental policy in the European Union the importance of such a concept was emphasized.[30]

4. ENVIRONMENTAL PROCEDURAL RIGHTS AS A MEANS OF A CONTROL OF PUBLIC AUTHORITIES – EU STANDARDS

The development of the environmental law at the level of the European Union started in the seventieth when the organs of the Union in its activities started to apply in a more and more intensive way the standards of the environmental policy. Today, the environmental policy should imbue all other policies of the European Union and its organs and institutions.[31]

28) The preamble to the Rio Declaration refers to "the integrity of the global environmental and developmental system." Principle 4 states: "In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it." See also principle 25: "Peace, development and environmental protection are interdependent and indivisible".

29) As Fitzmaurice has said, "International environmental law is one of the most energetic fields of international law. It appears that its contribution to international law will continue." See Fitzmaurice, Malgosia: "The contribution of environmental law to the development of modern international law", Makarczyk, Jerzy (ed.): "Theory of international law at the threshold of the21st century"; The Hague, Kluwer Law International, 1996; p. 25-30.

30) This had been done within the Fifth Environmental Action Programme from 1992, "it must be ensured… to public interest groups, in practical sense, access to courts, in order to secure a protection of their legal interest through effective accomplishment of prescribed environmental measures and prevention of illegal actions".

31) Ruffert, Mathias: "Subjektive Recte im Umweltrecht der EG", Heideberg, R.v. Deckler's Vrlg., 1996; p. 2-5.

The legislation of the European Union in the field of the environment is very developed. As told before, the directives bind the member-states and their governments to transpose them into their respective national law systems in the deadlines prescribed in which way they are legally compelled to impose the standards prescribed. However, experience shows that the environmental legislative in the European Union is visibly less applied and with less seriousness, and the deadlines are far less honored than in other regulations. From one side it happens so because of deficiencies in the very structures of environmental regulations that are not easy for the member –states to accept as well as because of problems in personnel and organizational structures of public officials in which realm the questions of the environment are located. From the other side, it happens because of the fact that most directives were based on Article 175 EC, which allows to member-states, based on Article 176 EC "to maintain or introduce more stringent environmental measures".[32] Surmounting such problems will surely be alleviated by strengthening the so-called decentralized control of implementing environmental laws, which on the national level consists in the participation of the broadest public in the processes of the environmental decision-making, as well as in giving the opportunity to the citizens to safeguard their rights in the questions of the environment in an efficient way in courts of law and in front of the administration, which taken together is also the mechanism for the control of other decisions made by authorities. As seen, the relationship of environmental rights of individual citizens and the public authorities in the greatest measure are based on the support which the public authorities extend through the system of issuing corresponding permits, in which way potential dangers for the environment are either thwarted or eliminated, and on the other side these rights are safeguarded by giving access to complaints. The aforementioned directive about access to environmental information must be mentioned again in this context, because only the free access to information enables and develops the control of the public – it informs the general public regarding the actions of public authorities on all level.[33]

The decentralization of the implementation of the EU environmental legislation on the level of the Union consists in carrying over the control authorization to institutions and the government of mem-

32) Krämer, Ludwig: "Thirty Years of EC Environmental Law: Perspectives and Prospectives"; in Krämer, L.: "European Environmental Law", Darmouth Publishing Company, England, 2003; p. 489.

33) Demmke, Christoph: "Die EG Umweltinformationsrichtlinie und die Vollzugsdefizite in der EG Umweltpolitik", in Hegele, D.; Röger, R.: "Umweltschutz durch Umweltinformation – Chancen und Grenzen des neuen Informationsanspruchs", Berlin, 1993; p. 33-61.

ber-states or given the case to even "lesser" bodies.[34] The European Commission is competent to supervise the fulfillment of the obligations of the member states, and connected to abovementioned may start proceedings in front of the European Court of Justice.[35] The obligations of member-states regarding the legislative of the European Union boil down to: incorporation of environmental laws into the framework of national legislations and providing a complete and correct incorporation in the entire national territory (it must be emphasized that all measures aimed in the sense of the legislative abovementioned must be transmitted to the Commission by notification). The control of the application in practice of the legislation incorporated is not in the domain of competence of the Commission or some other organ.

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34) Langenfeld, C.: "Europäische Intengration und nationalstaatliche Verwaltung"; in Siedentopf, H. (Edit.), 1990; p. 173.

35) Arndr, Hans- Wolfgang:" Europarecht", C.F. Müller Verlag, Heidelberg, 2001; p.43- 46.

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Марија Костић, Владимир Цамић

ПРАВО НА ПРИСТУП ИНФОРМАЦИЈАМА О ЖИВОТНОЈ СРЕДИНИ У ОКВИРУ КОНЦЕПТА ЉУДСКИХ ПРАВА И ПОЛИТИКЕ ЗАШТИТЕ ЖИВОТНЕ СРЕДИНЕ

Резиме

Последњих деценија све су интензивније дебате о праву на здраву животну средину и развоју људских права. Директна последица овакве интензивне академске дебате јесу управо све већи захтеви за унапређивањем људских права треће генерације. Аутори су у раду размотрили постојеће међународне конвенције, достигнуте стандарде унутар Европске уније у овој области и размотрили начине осавремењивања еколошке политике у циљу унапређивања свих или готово свих аспеката права на здраву животну средину и, самим тим, људских права *en generale*.

Право на здраву животну средину, као такозвано људско право треће генерације, у себи обухвата неколико важних елемената, односно права и то: од права на приступ информацијама од значаја за очување животне средине, преко права на вођење судских спорова у овој области, до права на политичку партиципацију, тј. права на учествовање у процесу доношења одлука, што директно утиче на развој и консолидацију демократског поретка, посебно у транзиционим државама.

Стога су аутори посебно нагласили важност имплементације достигнутих стандарда у оквиру комунитарног права, чиме би се еколошка политика у Србији, која је још увек у повоју, могла додатно унапредити, између осталог и у контексту приступања Србије Европској унији и усвајању правних тековина Европске уније у овој области.

Кључне речи: еколошка политика, право животне средине, људска права

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