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NUEVAS PERSPECTIVAS DEL DERECHO AMBIENTAL EN EL SIGLO XXI

NEW PERSPECTIVES ON ENVIRONMENTAL LAW IN THE 21TH CENTURY

Departamento de Medio Ambiente, Planificación Territorial y Vivienda del Gobierno Vasco

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ÍNDICE

Pág.

Pág.

Pág.

Pág.

Pág.

NOTA INTRODUCTORIA

1. Este trabajo recoge las ponencias presentadas a unas jornadas celebradas los días 24 y 25 de octubre de 2017 en Bilbao bajo el título *Nuevas Perspectivas del Derecho ambiental en el Siglo XXI-New Perspectives on Environmental Law in the 21th Centur*y.

2. Las jornadas pretendían suscitar una discusión sobre una serie de temas de interés en unos tiempos ambivalentes para el Derecho ambiental.

a) En efecto, por una parte, el despliegue de este ordenamiento jurídico es innegable y su incidencia en las instituciones y otros sistemas jurídicos. De ahí que con frecuencia se acuda a las técnicas del Derecho ambiental para explicar aspectos de la denominada Parte General de otras ramas del ordenamiento jurídico. Además, se puede percibir que comienzan a abrirse paso temas que exigen una reflexión sobre su génesis y la influencia que pueden tener en los procesos de decisión de las autoridades públicas y, en definitiva, en los ciudadanos en general, como sucede con el derecho a la alimentación o habría que decir a una alimentación que interiorice sus consecuencias para el medio ambiente, como también sucede con los organismos modificados genéticamente. A lo anterior se une la regulación del Derecho sobre las catástrofes naturales en un mundo que parece avanzar ciegamente a una realidad dominada por el cambio climático, resistiéndose a expresar compromisos concretos, como sucede con el denominado «Acuerdo» de París de 2015. Cierto es que todos los temas tratados en las jornadas no resultan «nuevos», pero tampoco es posible ignorar que algunos de ellos (v. g., el control de la aplicación del ordenamiento europeo, la potestad inspectora o la protección de biodiversidad ante una nueva edad geológica denominada «Antropoceno») puedan corresponder a lo

que inicialmente podría calificarse de cuestiones inacabadas del Derecho ambiental. Otro tema tratado (los tribunales ambientales en Reino Unido) puede servir también para superar la esclerotizada figura de los recursos administrativos (al menos en el Estado español), para una mejor consideración de los conflictos que rodean al medio ambiente.

b) Por otra parte, sin embargo, la configuración de los diferentes sectores del Derecho ambiental y, en definitiva, su efectividad, son cuestiones que necesariamente deben ser examinadas desde una perspectiva crítica, tan necesaria para calibrar sus deficiencias, las vías de mejora y, en última instancia, poner en cuestión la tendencia de las autoridades públicas a la autocomplacencia ante la norma positiva. A lo anterior se une el examen de qué papel tiene el Derecho ambiental en el entramado de políticas y decisiones que le afectan, ahogándolo o predeterminando su papel, o el fenómeno, que se podría calificar de «exótico invasor» de la norma vinculante, como es la adopción de estrategias que, en apariencia nadie discute, pero cuyos resultados distan de ser reales y sobre los cuales nadie acaba por responder.

3. Para concluir esta breve introducción, es necesario agradecer, como en otras ocasiones, a los titulares del Departamento de Medio Ambiente, Planificación Territorial y Vivienda del Gobierno Vasco, las facilidades para poder celebrar las jornadas y que esta recopilación de trabajos pueda ver la luz.

Bilbao, 17 de enero de 2018.

Agustín García Ureta

PREFACE

1. This book includes the contributions submitted to a conference titled *New Perspectives on Environmental Law in the 21th Centur*y, held in Bilbao on 24-25 October 2017.

2. The conference aimed to provoke a discussion on a series of topics of interest in uncertain times for environmental law.

a) On the one hand, the development of this branch of the Law is apparent as well as its impact on other laws. It is for this reason that environmental law techniques are nowadays invoked to explain matters pertaining to so called «substantive» or general law sections (e. g., administrative or civil liability matters). In addition, new issues demand proper consideration of their genesis and impact on decision-making processes and, ultimately, on citizens in general, as it is the case of the right to food or (more properly) to food internalizing its consequences for the environment, as it happens (albeit not only) with genetically modified organisms. Further issues deserving examination are the law on natural catastrophes, or the consequences derived from the Paris agreement of 2015 in spite of the lack of specific commitments to combat this worldwide phenomenon. Admittedly, all the issues addressed in the conference are not «new», as some of them (e. g., the control of the application of European environmental law, inspection powers for monitoring activities likely to impair the environment, or the protection of biodiversity in a new geological age called the «Anthropocene») may well correspond to unfinished environmental law matters. Another issue addressed in the conference (environmental courts) may also serve to overcome the sclerotic figure of administrative appeals (at least in Spain), with direct implications for better consideration of conflicts surrounding the protection of the environment.

b) On the other hand, however, the design of different environmental law areas and, in short, their effectiveness, are issues that must necessarily be examined from a critical viewpoint to assess their deficiencies, ways of improvement and arguably to question public authorities' self-satisfaction in the light of existing rules. In this regard, it is necessary to examine the role of environmental law within the framework of policies and decisions affecting it, or another phenomenon (which could be described as an «invasive species»), i. e. the myriad of strategies that conceal binding law obligations and in respect of which no one seems to be responsible for the lack of successful implementation.

3. To conclude this brief introduction, it is necessary to thank the Department of Environment, Territorial Planning and Housing of the Basque Government for the facilities to hold the conference and publish this book.

ON THE EFFECTIVENESS OF MONITORING THE APPLICATION OF EU ENVIRONMENTAL LAW

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I. THE APPLICATION OF ENVIRONMENTAL LAW - AN UNDERDEVELOPED AREA OF INTEREST

EU environmental law has, in about forty years of its existence[1], covered most of the areas of law which are generally considered to constitute «environmental law», such as water, air and climate change, nature conservation and noise, waste, liability for environmental damage, as well as several more horizontal issues such as access to environmental information, public participation in environmental decision-making, environmental impact assessment (dangerous) chemicals, genetically modified organisms and wild animal welfare. Furthermore, the legal obligation to integrate environmental requirements into other EU policies and activities[2] brought numerous legislative acts of agricultural and fisheries policy, of energy, transport and trade policy under the heading of environmental law[3]. Finally, the EU adhered to a consider-

[1] The first EU legislative act which explicitly aims at the protection of the environment, was Directive 75/439 on waste oils of 16 June 1975, OJ 1975, L 194 p. 23.

[2] Article 11 TFEU: «Environmental protection requirements must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development».

[3] See on EU environmental law in general, Jan JANS-Hans VEDDER, *EU Environmental Law,* 4th ed., 2011; Suzanne KINGSTON-Veerle HEYWAERT-Alexandra CAVOSKI, *European Environmen-*

able number of international environmental agreements which became thus binding for the EU itself and for its Member States[4].

The application of this environmental law within the European Union has received, until now, a rather limited attention, but wrongly so. Lawyers appear to attach more importance to the interpretation of (environmental) law than to its effective application. They might be influenced by the fact that most of (EU) law is adopted in order to deal with vested interests of specific social groups. Thus, agricultural law is the law of farmers, fisheries law the law of fishermen, transport law the law of persons who transport or are transported, competition law the law of competitors, etc.[5]. These social groups very actively particulate in the elaboration and later application of «their» sectoral law, by lobbying Parliaments, publishing articles, leaflets or brochures, sponsoring studies, organizing conferences and events and discussion the media to promote their arguments, spread news through associations and groups to inform the members of their group of positive or negative legal and political developments in their sector, discuss the economic impacts of measures, voice their concern, when the law in their sector appears disadvantageous for them, etc.

The environment has no such vested-interest group behind it. It is a general interest without a group. Environmental non-governmental organizations in Europe are structurally and financially much too weak to be able to defend environmental interests over a prolonged period of time. Linguistic difficulties and other problems do not allow them to organize themselves effectively beyond national boundaries, in contrast to trade, industry or agricultural groups. Environmental ministries, where they exist in Member States, normally have a limited influence on national and EU policy- making. As the EU environment suffers from slow, but progressive degradation — examples are the slowly rising temperatures which signal climate change, the loss of biodiversity, soil erosion or the air pollution in urban agglomerations— media interest in the environment is limited and principally activated in cases of accidents or sudden, unexpected events which cause environmental damage. However, where conflicts between the protection of the general interest «environment» and vested interests appear, very regularly the environment loses. In

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tal Law, 2017; Ludwig Krämer, *EU Environmental Law,* 8th ed., 2015; Maria Lee, *EU Environmental Law. Governance and Decision-Making,* 2nd ed., 2015; Geert Van Calster-Leonie Reins, *EU Environmental Law,* 2017. There are furthermore presentations of EU environmental law in the different other EU languages.

[4] Article 216(2) TFEU: «Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States».

[5] This remark is made, despite the fact that there is also a general interest of society to have a functioning competition, a producing agriculture or an efficient transport system. However, the very important vested interest aspect in most sectors of economy-related law is obvious.

this way, the environment, an interest without a voice, slowly dies in silence.

Even academics' interest in the application of environmental law is, at least in Europe, limited. It is much easier to study the statue law or the jurisprudence than to examine how the law is applied in practice, as this would require field studies, fact-finding investigations and controversial discussions with vested interest representatives or public authorities, where the academic education and training meets reality and is thus of limited use to its bearer.

For these reasons, the effective application of the numerous provisions of international, European Union, but also of national, regional and local environmental is the most important problem which environmental law faces - and at the same time one of the items which is the least discussed in detail.

This contribution will pass in review the practice of monitoring the application of EU environmental law. In a first part, the present practice of monitoring application of EU environmental law will be discussed; as EU environmental law is to be applied in and by Member States[6], examples for national application will be mainly taken from the national level, and one Member State, Spain, was chosen for that[7]. In a second part, the effectiveness of the monitoring activities of the European Commission will be assessed. Some concluding remarks will end the contribution.

II. THE PRACTICE OF MONITORING THE APPLICATION OF EU ENVIRONMENTAL LAW

1. The responsibility for applying EU environmental law

Under Article 192(4) TFEU, the Member States implement the EU environmental policy. This obligation includes the implementation of the legislative measures that were adopted in pursuance of this policy. According to Article 4(3) TEU, Member States have to adopt all general or particular measures to ensure fulfilment of the obligations arising from the acts of the institutions of the EU, and to refrain from any measure which could jeopardise the attainment of the EU

[6] European Parliament, resolution of 16 November 2017 on the EU Environmental Implementation Review EIR [2017/2705(RSP)]: «70% of EU environmental law is implemented by regional and local authorities».

[7] This is not meant as a specific criticism of Spain or of its application of EU environmental law. Indeed, similar comments as in this contribution could be made on almost any other Member State. However, an examination of the practice of applying EU environmental law in all 28 Member States would require the writing of a book.

objectives in environmental policy. A Member State which considers that another Member State has failed to fulfil an obligation under the Treaties may bring the matter before the EU Court of Justice (CJEU)[8]. Should the Commission, in disregard of its EU Treaty obligations, fail to act, a Member State may bring an action before the CJEU to have the infringement established[9].

The Commission «shall ensure the application of the Treaties, and of the measures adopted by the institutions pursuant to them. It shall oversee the application of Union law» under the control of the CJEU[10]. When the Commission is of the opinion that a Member State failed to fulfil an obligation under EU law, it may bring the matter before the CJEU[11].

Under Article 149 of the Spanish Constitution of 1978, the State «shall have exclusive competence over the following matters. 23. Basic legislation on environmental protection, without prejudice of the Comunidades Autónomas to take additional protective matters;» Article 148 states that the Comunidades Autónomas (Self-governing Communities) «may assume competence over the following matters... 9. management of environmental protection».

It appears that under general Spanish law, the body which is competent to adopt legislation, is also competent to ensure its application, though, of course, with regard to the EU, the Spanish Central State has assumed specific responsibilities with regard to the compliance with EU law. To complicate matters further, the Statute, for example, of the Comunidad Autónoma of the Basque Country provides in Article 11: «It is the competence of the Comunidad Autónoma to ensure, within its territory, the evolution and execution of the basic legislation of the State as regards (a) the environment and ecology...».

This is not the place to consider in detail the intricacies of the Spanish repartition of competences as regards the application of environmental law. Suffice it to note that the Spanish Constitutional Court pleaded for close collaboration and cooperation between the Central State and the Comunidades Autónomas on the application of (environmental) legislation. There appears, though, in practice, to be room for intensifying

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[8] Article 259 TFEU. In environmental matters, this provision was never applied.

[9] Article 265 TFEU.

[10] Article 17 TEU: «The Commission shall promote the general interest of the Union and take appropriate initiatives to that end. It shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them. It shall ensure the application of Union law under the control of the Court of Justice of the European Union».

[11] Article 258 TFEU: «If the Commission considers that a Member State has failed to fulfil an obligation under the treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.

If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union».

such cooperation. In the last instance, the Central State may recur to the provision of Article 155 of the Spanish constitution in order to enforce compliance with (national) Spanish law[12], though this provision is seen, in Spain, as being of highly political character. It was only used, for the very first time, in October 2017, when the Central State destituted the regional Government of Catalonia. It is politically inimaginable that this provision would be used to enforce full application of EU environmental law in a Comunidad Autónoma. De facto, thus, there lacks a provision similar to that of Article 17 TEU which would provide that the Central State shall oversee, control or ensure the application of Spanish environmental law or of EU environmental law which was transposed into Spanish law.

Monitoring the application of EU environmental law mainly refers to EU directives. According to Article 288 TFEU, environmental regulations are binding in their entirety and directly applicable in all Member States. For this reason, environmental regulations normally do not contain a provision which requests Member States to inform the Commission of the legislative and other measures undertaken to transpose the provisions of a regulation into the national legal order.

However, this is only half of the truth. In practice, environmental regulations contain very frequently provisions which request Member States to adopt specific measures or take specific actions. For example, Regulation 1013/2006 on the shipment of waste[13] provides that Member States appoint competent authorities (Article 53), fix sanctions and penalties for infringements of the Regulation (Article 50), send reports to the Commission (Article 51), provide for cost provisions to charge persons who ship waste (Article 29), inform other Member States of cases of illegal shipments which they discover (Article 24), approve the financial guarantees for persons who intend to ship waste (Article 6) etc. Other EU Regulations contain or may contain other provisions which oblige the Member States to take specific measures.

Therefore, most Member States also adopt national (or regional) legislation as a follow-up to an EU environmental regulation. As mentioned, these regulations, though, normally do not provide for an obligation to send to the Commission the national provisions adopted, and this is normally not done. Paradoxically, thus, the Commission is often less well informed of a Member State's national legislation in an

[12] Article 155 of the Spanish Constitution: «1. If a Comunidad Autónoma does not fulfil the obligations imposed upon it by the Constitution or other laws, or acts in a way that is seriously prejudicial to the general interest of Spain, the Government, after having lodged a complaint with the President of the Comunidad Autónoma and failed to receive satisfaction therefore, may, following approval granted by the overall majority of the Senate, take all the measures necessary to compel the Comunidad Autónoma to meet said obligations, or to protect the abovementioned general interest. 2. [...]».

[13] Regulation 1013/2006, on the shipment of waste, OJ 2006, L 190, p 1.

area which is covered by a regulation than in areas which are covered by a directive. And this incomplete information influences the monitoring of the application of regulations.

In contrast, practically all environmental directives adopted by the EU contain a provision requesting the Member States to communicate to the Commission the legislative provisions which they adopted in the area covered by the respective directive[14]. The obligation to transpose a directive into national law has to take place within a specific timespan which is laid down in each directive and which varies normally between18 months and three years[15].

The transposition of an environmental directive into national law is only exceptionally done by one single national legislative act. First, in Member States which also have legislative competences of the regions —Länder, Comunidades Autónomas, Regioni etc.— a directive may be transposed by regional instead of or in complementing national legislation. Furthermore, directives may touch on areas which are, at the level of Member States, regulated by different pieces of legislation. For example, the Directive on the prevention of industrial accidents[16] touched on social legislation (safety at work), chemicals, industrial installations, information of the public, town and country planning, air, water and soil emissions, waste issues, impact assessment law, maritime legislation etc. The Directive on the conservation of fauna, flora and habitats concerned nature protection, birds protection, hunting law, trade in endangered species, impact assessment laws, town and country planning, the protection of endangered species, animal welfare, agricultural and fisheries law etc. This resulted in the 28 Member States transmitting not less than 927 national legislative transposition measures to the Commission.

2. The monitoring tasks

The task of the Commission with regard to the monitoring of the application of EU law is threefold:

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[14] See for example Directive 2011/92 on the assessment of the effects of certain public and private projects on the environment, OJ 2012, L 26, p. 1. Article 13: «Member States shall communicate to the Commission the texts of the provisions of national law which they adopt in the field covered by this Directive». In contrast to this, Article 33(3) of Directive 2008/50 on ambient air pollution and cleaner air for Europe, OJ 2008, L 152, p. 1 only required to transmit the *main* provisions to the Commission.

[15] For example, Directive 2003/87 on an EU greenhouse gas emission allocation trading scheme, OJ 2003, L 275, p. 32, provided for a transposition period of two months (Article 31), Directive 2001/42 on an environmental impact assessment for plans and programmes, OJ 2001, L 197, p. 30 for a period of three years (Article 13), and Directive 2002/49 on environmental noise, OJ 2002, L 189, p. 12 for a period of two years.

[16] Directive 2012/18 on the prevention of industrial accidents, OJ 2012, L 197, p. 1.