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The Road Toward the Effectiveness of Environmental Law

O Caminho para a Efetividade do Direito Ambiental

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Abstract: The key problem of contemporary environmental laws is their lack of effectiveness. Clear challenges exist to achieve the goals and objectives of environmental law, its implementation and sustained and recurring compliance. As a result, this paper aims to clarify the root causes of ineffectiveness of environmental law by analyzing its effects and consequences and exploring possible solutions to enable environmental law to reach full effectiveness and efficiency, and thereby satisfy the main goal of conservation and rational, sustainable and equitable use of environmental goods and services.

Keywords: Efficacy. Effectiveness. Efficiency. Environmental Hermeneutics. Progressive Principle. Non Regression Principle.

Resumo: O problema central das normas ambientais contemporâneas é a sua falta de efetividade. Existem desafios evidentes para o alcance das metas e objetivos do direito ambiental, sua implementação e cumprimento contínuo e recorrente. Como resultado, este artigo pretende esclarecer as causas da falta de efetividade do direito ambiental, analisando seus efeitos e consequências e explorando possíveis soluções para permitir que o direito ambiental alcance plena efetividade e eficiência e, assim, atenda ao objetivo principal de conservação e uso racional, sustentável e equitativo dos bens e serviços ambientais.

Palavras-chave: Eficácia. Efetividade. Eficiência. Hermenêutica Ambiental. Princípio de Progressividade. Princípio de Proibição do Retrocesso.

1 Introduction

The worst that can happen to and environmental law is to fall in a state of generalized non-compliance" (Gabriel Real Ferrer).

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The main problem environmental law faces today is its lack of effectiveness. Very clear deficiencies exist for environmental law to achieve its goals and objectives while securing effective implementation and recurring and sustained compliance.

Environmental law has failed to maintain and guarantee an ecological balance, an efficient economy and social equality for current and future generations. As a consequence, it is necessary to explore the main causes of the ineffectiveness in environmental law, the resulting effects and consequences, and to propose possible solutions that will allow environmental law to end its current state of theatricality and achieve full effectiveness and efficiency.

2 Causes and Consequences of the Ineffectiveness of Environmental Law

One of the main causes of ineffective environmental regulation is the exponential growth of environmental rules, including modifications in laws without clear or complete derogatory processes, copies of laws and standards from other countries that do not match the country's environmental, social and economic reality; the approval of norms without plans for their application and fulfillment, the ratification of international treaties without the proper adaptation of national laws, differences between the laws that have been approved and the environmental policies that are being applied, as well as the constant clashes between the regulations of free trade and investment and the environmental norms.

The consequence of the above includes:

a) the promulgation of regressive policies, norms and judicial precedents;
b) the publication and application of norms that do not take into account public participation vulnerable groups, social equality, the identity of indigenous groups, nor global warming;

c) little or no development of procedural laws nor special procedures or jurisdictions for environmental cases;
d) little or no development of mechanisms for alternative resolutions in environmental conflicts;
e) procedural systems that are used to determine the liability for environmental damage which are either non-existent or incomplete;
f) the absence of specific criteria for interpretation and application of access rights and very weak environmental institutions.

This has created a dispersed, fragmented and contradictory environmental legal framework that generates ignorance amongst those who apply the law and those who are at the receiving end of this application; confusion, disregard and the incorrect application of the law; legal uncertainty; and of course, impunity and environmental injustice.

3 Possible Solutions

Realising efficient and effective environmental laws will require implementation of a coherent, articulate and systematic legal framework. This could be acheived through legal processes that facilitate the coordination, systematization, the cleaning of contradictions and paradoxes, and rationalization. In the words of professor Jordano Fraga: "*If the 19th Century was the century of civil codification that began with the Code Napoleon, the 21st Century will be the century of environmental codification."*[1]

The promulgation of the new norms and the codification processes must modify and adapt internal law to the international environmental law, as well as the harmonization of the legal framework surrounding the existing environmental policies. The State's political will and the support from its people are key to achieving complete effectiveness and efficiency.

[1] Jordano Fraga, J. El futuro del derecho ambiental. Medio Ambiente & Derecho, Revista Electrónica de Derecho Ambiental, University of Sevilla, number 24, 2013.

Serious and dedicated backup from the United Nations and its United Nations Environmental Program in the process of elaborating and negotiating international legal instruments to protect the environment are a key element that may help correct the distortions that the free trade processes had created on the environment.

In the short term, environmental interpretationare the basic tool for achieving coherence in the environmental public laws, as well as the starting point that is going to allow environmental law to leave its state of ineffectiveness.

The legal operator can transform norms that in their original form cannot provide a quick, real and effective solution to the challenges that are presented due to the environmental challenges we face today; by applying the principles that are inherent of environmental law, always taking in account the constitutional law for a due process and right of defense. Because of this, the enforcer of the law is obliged to choose which way is more adequate to fulfill the obligations and purposes that environmental laws impose.

The new norms and environmental standards must adapt to the unequivocal rules of science and technique, as well as to accompany themselves with application and compliance plans that ensure the existence of technical and institutional capacity and enough budget for them to be implemented.

The regulatory processes must take in account the creation of instances for coordination within and between institutions in charge of environmental administration, that also include public participation as a way to guarantee its effective application.

It must be very clear that some laws implemented in certain countries may result inadequate and may present an unnecessary social and economic cost in other countries, especially the developing ones.

In the light of the deregulation and the processes simplifications that result in budget cuts, dismantling of governmental intervention programs, as well the reduction, relaxation or even the derogation of laws that are meant to protect the environment, the solution to this is the clear

acknowledgement of the progressive and the non-regression principles as general principles of environmental law.

It is necessary to implement participatory mechanisms in the creation of new environmental laws such as people's initiative, public consultation, referendum, and others. At the same time, the processes that create and apply environmental laws must include public participation and guarantee equality, non-discrimination and inclusion of vulnerable groups, recognize multicultural composition and diversity and focus on global warming.

Substantive environmental law needs to be reinforced with procedural regulations that allow its correct, strict and effective application in processes that involve environmental controversies. Environmental processes ought to be expeditious, informal, of preferential tramitation and expedited guardianship, they must be guided by the rules of orality, immediacy, concentration, publicity, itinerancy and gratuity. Court and administrative decisions must be based on the criteria of justice, equality and the quest for factual reality. The environmental judge must be a specialist on the subject, proactive and with wide-ranging powers. Environmental processes must ensure the cease and prevention of damages, environmental recomposition and the compensation of subjective rights. Regarding the access to justice, it would be ideal for the legal capacity to take part in environmental processes to be so open that any subject can propose legal actions in order to protect the environment.

Alternative dispute resolution mechanisms must be taken in account, including the possibility for the Public Administration to reach agreements on the subject. Precautionary measures must be broad and it should be possible to apply them before and during the process and even during the execution of the sentence. Evidence must be analyzed using the rules of sane critic and the basic principle of in dubio pro natura. The hearings must take place were the environmental damage occurred. The sentences must dictate environmental recomposition and the compensation of subjective rights, and also contemplate effective mechanisms for control and inspection. The implementation of environmental funds and insurances can help to recompose damaged

ecosystems. In order to comply with the duty of accountability and transparency, there should be a public registry for the environmental processes where people can find the cases handled, their state, the rulings and their compliance, the convictions over the defendants and how they are being fulfilled.

The liability systems that result from environmental damage must be preventive, precautionary, compensatory, and restorative, and must be based on the rules of joint and absolute liability, the reversal of the burden of proof, the obligation recompose the ecosystem and the non-applicability of environmental damage, all through a lens of comprehensive responsibility. It is necessary to question the use of monetary sanctions for dissuasive purposes on major environmental damages, as an adequate complement to the polluter pays and full reparation of the damage to the environment principles.[2]

When it comes to criminal and administrative liability, it is fundamental to expand environmental crime and administrative sanctions. However, the most important weapon environmental law has for achieving real effectiveness is the prevention of damages, which can be achieve providing better information, education and public participation.

The role of criminal law must be reinforced through the imposition of the duty of environmental recomposition of parties that were condemned for environmental crimes as well as those who were offered alternative measures to imprisonment.

It is essential to guarantee an easy, fast, practical and effective access to environmental information, to guarantee participation in order to promote social inclusion, solidarity, poverty and inequality eradication, reestablish the health and balance of the environment and eliminate the barriers in the access to environmental justice, improve the reporting and inspection systems, as well as to create guidelines for attorneys and other legal operators that implement administrative and criminal sanctions; guarantee the equality in the conditions of accessibility and effectiveness

[2] Peña Chacón, M. Daño social, daño moral colectivo y daños punitivos. Delimitaciones y alcances en materia ambiental. Revista Direito Ambiental RDA year 17, number 68, October – December, Brazil, 2012.

during all the stages of the judicial and/or administrative process; as well as to promote environmental sensibility and education.

The effective implementation of access rights constitutes an essential condition for reaching the effectiveness of environmental law. A big step in this could be the adoption of the Declaration on the Application of Rio Principle 10, backed by the Economic Commission for Latin America and the Caribbean (ECLAC).

Weak environmental institutionalism should be reinforced by the strengthening of inspection mechanisms; the creation of institutional coordination mechanisms; the modification of the legal framework in order to clarify environmental competences and the sustained and rational growth of the institutional budgets, according to their functions.

The environmental administration can be improved if prevention, participation and education are emphasized. Command and control mechanisms must not be left aside, but they must be complemented with money market and voluntary instruments.

Finally, it is imperative to develop environmental accounting, as well as the implementation of indicators that measure the effectiveness of environmental norms.

Certainly, the road towards effective environmental law is long and winding, Ojede Metre reminds us that *"Environmental law swims against the current and in dirty water"*, to this we must add up that it is done among sharks. However, there's no turning back, as Montoro Chiner explains: *"This is the century of the environmental rule of law, otherwise there would not be a century."*

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