



Michel Prieur

## Non-regression in environmental law

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## Views

# Non-Regression in Environmental Law

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Would it appear that we have entered an era of law that refuses established rights in the name of sovereignty of laws and Parliaments — “what a law can do can be undone by another law”? Is this not in contradiction with the rights of future generations, the paradigm of sustainable development proclaimed by States in Rio in 1992 and reaffirmed in Rio twenty years later?



The environment is a value-policy and an ethic (or a “moral of the environment”, as said by French President Pompidou in 1970<sup>1</sup>) that, because of its scope, reflects a permanent quest for improved human and animal well-being in the name of permanent social progress. Environmental policies, if they reflect progress, should ban any regression.

Since the 1972 UN Conference in Stockholm, the main purpose of environmental policies and of their indispensable implementation instrument – environmental law, both national and international – is to contribute to abating pollution and preserving biological diversity.

At a time when environmental law is enshrined in numerous constitutions as a new human right, it is paradoxically threatened in its substance. This could lead to a U-turn and a real regression that would be detrimental to the future of humankind and a threat to intergenerational environmental fairness.

Should not environmental law be included in the category of eternal legal rules, and therefore be non-repealable in the name of the common interest of humanity?

Several threats exist that could curb environmental law. They are:

- political: the often demagogic will to simplify laws leads to deregulation, indeed to the repeal of environmental legislation, in view of the growing number of national and international legal environmental standards;
- economic: the global economic crisis is conducive to speeches calling for fewer legal environmental obligations, some people considering that they hinder development and poverty reduction;
- psychological: the huge scope of environmental standards means they are complex and difficult to understand for non-specialists, which encourages calls for less restrictive environmental laws.

Regression takes many forms. It is seldom explicit, since governments do not have the courage to announce backtracking in environmental protection officially for fear of an unfavourable public response from environmental and consumer NGOs.

- Internationally, it can take the form of refusing to adhere to universal environmental treaties, boycotting their implementation, or even denouncing them. This happened for the first time in the field of international environmental law when Canada decided to denounce the Kyoto Protocol during the Conference of the Parties to the Climate Change Convention in Durban in December 2011.
- In EU environmental legislation, regression is diffuse and appears when certain directives are revised.
- National environmental legislation is subject to increasing and often insidious regression:
  - changing procedures so as to curtail the rights of the public on the pretext of simplification;
  - repealing or amending environmental rules, thus reducing means of protection or rendering them ineffective. Exceptionally, such regressions may be validated by a judge: for example, on the 27<sup>th</sup> April 2012, the Panama Supreme Court ruled for a provisional suspension of the Protected Area status given to the mangroves of Panama Bay.

Faced with this diversity of forms of regression, environmental lawyers must respond firmly and rely on implacable legal arguments. Public opinion, once alerted, would not tolerate reversals in environmental and therefore health protection.

A group of legal experts was created in August 2010 within the IUCN Environmental Law Commission. It aims at pooling relevant universal legal experience and arguments in order to put an end to threats of environmental law backsliding in liaison with a Franco-Argentinean research group of the ECOS-Sud<sup>1</sup>/MINCyT<sup>2</sup> cooperation programme between the University of Limoges (France) and the National University of the Littoral in Santa Fe (Argentina).

Legal arguments must indeed be deployed so as to create a new principle of environmental law, in addition to those already recognised since Rio 1992 (*viz* prevention, precaution, polluter pays and public participation principles). This new principle is already recognised in a small number of national constitutions and legislations. Some courts refer to it. Legal doctrine has started to show an interest, in particular among Brazilian lawyers. “Non-regression” was for the first time the subject of proposals and discussion at European and international level, first in the European Parliament in September 2011<sup>ii</sup> [Resolution 29 September 2011, par. 97], then in New York and Rio in the framework of Rio+20 in 2012.

The legal arguments are based on:

1 – **Legal theory and philosophy of law:** is it acceptable to depart from the theory of mutability of laws, the very foundation of democratic systems? Classical authors consider laws are necessarily subject to a rule of permanent adaptation that reflects changes in social requirements. Any legal rule must be modifiable or repealable at any time, for it would be

morally unthinkable that a “generation of men, in any country, be possessed of the right or the power of binding and controlling posterity to the ‘end of time,’ or of commanding forever how the world shall be governed” (Paine, 1792, p.55<sup>iii</sup>). It is along the same lines that Article 28 of the draft Human Rights Declaration<sup>iv</sup> of June 24<sup>th</sup> 1793 stated: “a generation cannot subject future generations to its laws”.

Apart from the fact that the article was never adopted, the environment and sustainable development compel us today to think differently. The concept of sustainable development now means that the right to life and health of future generations must not be overlooked and measures that would be detrimental to them must not be adopted. Minimizing or repealing rules protecting the environment would result in imposing a more degraded environment on future generations. Therefore, the above-mentioned Article 28 taken literally, combined with the principle of sustainable development, can nowadays be interpreted in the environmental area as speaking in favour of the principle of non-regression, since it prohibits subjecting future generations to a law that would reduce environmental protection.

2 – **Human rights theory:** international law, through the 1966 international covenants, aims for the constant progress of protected rights; it is interpreted as prohibiting regression. Environmental law, now a human right, can benefit from this theory of constant progress applied in particular to social rights. In its General Comment 3 of December 14 1990, the UN Committee for Economic Social and Cultural Rights (CESCR) condemns “any deliberately retrogressive measures” (Para.9)<sup>v</sup>. The idea that once a human right is recognised it cannot be restrained, destroyed or repealed is shared by all major international instruments on human rights (Universal Declaration of Human Rights, 1948, Art. 30<sup>vi</sup>; European Convention on Human Rights, 1950, Arts. 17 and 53<sup>vii</sup>; Art. 5 of the two 1966 human rights covenants<sup>viii</sup>).

3 – **International environmental law:** universal or regional international environmental conventions all aim at “improving the environment”. The final nature of international environmental law is easily apprehended on reading all international environmental conventions. As specified in the 1992 Rio Declaration on Environment and Development, they all undertake to “conserve, protect and restore the health and integrity of the Earth’s ecosystem” (Principle 7)<sup>ix</sup>. Aiming at protection means conversely asserting that any contrary measure is prohibited. A number of conventions state expressly that there can be no reversal: it is forbidden to reduce the level of environmental protection (e.g. North American Agreement On Environmental Cooperation, 1994<sup>x</sup>).

4 – **European Union law:** the Lisbon treaty (Art.2, para.3<sup>xi</sup>) aims at a high level of protection and improvement of the quality of the environment; there can be no derogation from this principle, based on the theory of “*acquis communautaires*”.

1 Evaluation-orientation de la COopération Scientifique française dans le Cône Sud [Assessment-direction of the French scientific cooperative in the southernmost regions of South America]

2 Ministry of Science, Technology and Innovation of Argentina.



5 – **Constitutional law:** a number of countries (e.g. Brazil, Portugal, Germany), have eternal provisions (*clausula petrea*) in their constitutions. They can be interpreted as including human rights to the environment. The 2008 constitution of Ecuador<sup>xii</sup> recognizes non-regression in the field of the environment, and the 2008 constitution of Bhutan<sup>xiii</sup> declares that 70% of the country's forests are eternal. Law-makers are sometimes prohibited from reducing or restraining fundamental rights (for instance in Argentina or Spain): it should be possible to apply this limitation to environmental law, which has become a fundamental right, by invoking it in national courts and raising awareness in constitutional doctrine and NGOs.

6 – **National environmental law:** whereas national texts on the environment all proclaim as imperative reducing damage to the environment, they can, conversely, be interpreted as prohibiting any retrogressive measure.

7 – Finally, **jurisprudence in the various national, regional and international courts:** it is advisable to inform judges and explain to them the existence of the principle of non-regression by publicising the first rulings that refer to this principle (in Hungary, Belgium, Brazil and Spain as well as the Inter-American Court of Human Rights, July 1, 2009<sup>xiv</sup>).

The principle of non-regression was first established by a referendum in California<sup>xv</sup> on November 2, 2010, when a majority of voters refused to suspend a law on climate change and reduction of greenhouse gas emissions as requested by oil companies. The Swiss popular initiative in late 2011 prohibiting more than 20% of second homes in rural areas can be interpreted as expressing a refusal of increasing landscape and environmental degradation.

The principle of non-regression is thus emerging in states and at an international level. The French Senate, in its contribution to Rio + 20, included the principle among its recommendations<sup>xvi</sup> (report No 545 by L. Rossignol, May 22, 2012). The International Centre of Comparative Environmental Law (CIDCE) made it its main proposal for the Rio + 20 Conference. This resulted in a consensus of the Major Groups in its favour, and in the express proposal by the Group of 77 + China to include it in the final document – “*The Future We Want*” (UN, 2012, June 19<sup>xvii</sup>) – during informal negotiations on May 4 and 31, 2012 in New York.

In the face of opposition from the USA, Japan and Canada, and the indecision of the EU and Switzerland, Brazil, in its role as president of the conference, imposed the withdrawal of the expression “Principle of non-regression”. However, the principle was reintroduced with different wording in the final text adopted on the 22<sup>nd</sup> June, 2012. According to paragraph 20, after having noted some backtracking in the integration of the three dimensions of sustainable development<sup>3</sup>, it is written: “In this regard, it is critical that we do not backtrack from our commitment to

the earth summit.” Thus, the term “non-regression” was replaced by “do not backtrack”, which carries the same meaning. The statement applies to all the decisions taken at Rio in 1992, that is to say, the three conventions, the Rio declaration, Agenda 21 and the forests declaration. The reaffirmation to implement in full the Rio 1992 commitments reinforces the idea of non-regression and contributes to the formation of a judicial obligation, following the custom of international law. The IUCN should adopt a recommendation in this direction on the occasion of the WCC in Jeju in September, 2012.

However, it is certain that the principle of non-regression allows for exceptions, so long as they do not contravene fundamental environmental policy objectives. For instance, under CITES on the international trade in endangered species of wild flora and fauna, species that are no longer endangered could be removed from the list without a regression in the level of protection. The ban on a particular pollutant could be lifted when it is demonstrated that it no longer poses a health hazard. Non-regression does not prohibit repealing or amending existing texts. There is no question of “freezing” environmental law. On the contrary, with the scientific progress that will result from the implementation of the precautionary principle, either it will be strengthened to deal with new threats to health and nature, or it will be eased if a source of pollution that required protection is demonstrated to be innocuous. The main thing is that the new rule continues to contribute to environmental and health protection, and does not worsen pollution or loss of biodiversity. In order, therefore, to assess whether a new rule or changes to an old one are retrogressive, there must be a special chapter in the impact study of the draft bill or decree demonstrating non-regression on the basis of relevant indicators of the state of the environment, including legal indicators.

## FURTHER READING

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3 Viz. economic prosperity, environmental quality and social equity.

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- iii Paine, T. (1791). *Rights of Man: Answer to Mr Burke's Attack on the French Revolution*. London: Jordan.
- iv Republic of France, Constitution of the Year 1, Declaration of the Rights of Man and Citizen, 1793, 24<sup>th</sup> June 1793.
- v UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No.3: The Nature of States Parties Obligations*, Art.2, Para.1 of the Covenant, 14 December 1990, E/1991/23. Available at: [www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/94bdbaf59b43a424c12563ed0052b664](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/94bdbaf59b43a424c12563ed0052b664)
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- ix UN General Assembly, *Report of the UN Conference on Environment and Development*, Annex 1: Rio Declaration on Environment and Development, Rio de Janeiro, 3-14 June 1992, UN Doc. A/CONF.151/26 (vol. I). Available at: [www.un.org/documents/ga/conf151/aconf15126-1](http://www.un.org/documents/ga/conf151/aconf15126-1)
- x NAAEC [North American Agreement On Environmental Cooperation] [Aug. 1993], US-Can.-Mex., US Gov't Printing Office [1993], entered into force 1 January 1994. *Part Three: Commission for Environmental Cooperation*, Art.10, Para.3(b). Available at: [www.cec.org/Page.asp?PageID=1226&SiteNodeID=567](http://www.cec.org/Page.asp?PageID=1226&SiteNodeID=567)
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- xii Available from <http://pdba.georgetown.edu/Constitutions/Ecuador/english08.html>
- xiii Available from <http://www.wipo.int/wipolex/en/details.jsp?id=5214>
- xiv I/A Court H.R., *Acevedo Buendia et al. case*, Judgment of July 1, 2009, Series C, No. 198, para. 103.
- xv Proposition 23, which would have suspended AB 32, the "Global Warming Act of 2006", was on the November 2, 2010 ballot in California as an initiated state statute, where it was defeated.
- xvi France Senate. *Rio plus 20 : l'émergence d'un nouveau monde [Rio+20: the emergence of a new world.]*. Report no. 545 (2011-2012) by Senator L. Rossignol, representing the commission for sustainable development, submitted 22 May, 2012. [www.senat.fr/rap/r11-545/r11-5451.pdf](http://www.senat.fr/rap/r11-545/r11-5451.pdf) [accessed 7 July, 2012].
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