



Environmental Protection: A Fundamental Right or a Social Objective? Comparative Constitutional Overview

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Abstract

The protection of the environment is at the center of the current political debate in Europe and more widely, since the protection of human health is inevitably linked to the health of the environment. The relationship between environmental pollution and human health has been scientifically proven. The inclusion of environmental protection as a fundamental right in the Constitution on the one hand is very important because it affects the orientation and direction of the work of the parliament in relation to environmental policies in the future, while on the other hand it prevents the hegemony of the parliamentary majority in the implementation of some production policies to the detriment of the environment and therefore to the detriment of the health of the country's citizens. Initially, in this paper, the author will focus on the concept and importance of environmental protection, to continue later with the sources of environmental law at the international and national level. In this work, the question that was asked at the beginning of the time will be answered, that is, if the protection of the environment is a right that we can demand its respect in court or simply a social objective that the state wants to realize within its possibilities. I am sure that in the time of globalization, the modern lawyer cannot ignore the comparative analysis, since it now constitutes an essential analytical point of view for it. For this reason, the author will analyze environmental law in the comparative dimension, based mainly on the Constitutions of the countries of the European Union, an organization in which Albania wants to join in the not too distant future. The comparative method is a necessary tool to better understand the complexities arising from the globalization of law, which is characterized by the intermingling of different social, political and economic interests.

Keywords: *environmental protection, subjective right, social objectives, Constitution, comparison*

1. Introduction

1.1 The concept and importance of environmental protection

First of all, it should be noted that talking about environmental rights and defining the word environment is not easy at all. The word environment comes from the Latin *abiens* which means to go around and means everything that is around or surrounds something (Enciklopedia, Treccani). The definition of the term environment is very important regarding the implementation of national and international resources, as well as the determination of responsibility in cases of its

damage (Stile, 2014). From the beginning, Caravita¹ has asserted that "environment" should be understood as "the ecological balance, at times, of the biosphere or of individual reference ecosystems" and "by "environmental protection" should be understood the protection of the ecological balance of the biosphere and ecosystems considered" (Caravita, Cassetti, Morrone, 2016). Massimo Giannini² has argued that the environment is not a legal notion but the sum of a series of legal profiles.³ Based on the law in force in that period, he configures three important legal notions of the environment:

- the environment to which the legislation refers and the different movements related to the landscape;⁴
- the environment to which the legislation refers and the different movements regarding the protection of land, air and water;⁵
- the environment referred to in the urban planning regulations and studies⁶ (Grassi, 2023).

To save time, I am not stopping at the definition of the environment according to the legislation before political pluralism, but I will stop to research the definition of the environment according to the legislation adopted after the 90s in the Parliamentary Republic of Albania. The first Albanian law after the fall of the totalitarian regime for the protection of the environment defined the environment as *the totality of natural and human elements and factors in their actions and interactions* (Albania, Law Nr.7664/1993). Natural elements and factors are represented by plant and animal organisms, water, air, soil and subsoil, solar radiation as well as all natural processes and phenomena that derive from their interaction and condition life, while human factors are represented by the being of human society and the actor its economic and social (Albania, Law Nr.7664/1993). As can be seen in this period, we are dealing with a detailed definition of the term environment, which survives legislative changes until 2002, when the 1993 law was repealed and a new law for the protection of the environment was adopted. According to the new law, the environment is the set of interactions of biotic and non-biotic components that promote and nourish living life on earth, including the biophysical environment, nature and air, land, water, diversity of biological ecosystems, human health, values and cultural, scientific, religious and social heritage (Albania, Law Nr. 8934/2002). It is noted that in this law the environment is defined as a community of interactions of different components that promote and nurture life on earth. This law specifies in detail human factors, such as human health, cultural, scientific, religious and social values and heritage. Meanwhile, in the last law of 2011, this definition is given: the environment is the natural components of air, soil, water, climate, flora and fauna, in the entirety of their interactions with each other, as well as cultural heritage as part of the environment created by man (Albania, Law Nr.10431/2011). Unlike the previous definitions, the term environment is defined in a more concise form emphasizing the complex nature of the environment as a whole of interactions of its natural components. Naturally, the question arises why is the definition of the term environment important? In the opinion of the author, the clearest definition of the term environment is directly related to the most effective protection of it. Seeing that the environment is an integral part of multi-dimensional development, it is the duty of the State to protect and preserve it. The Albanian legislation in force has declared the protection of the environment from pollution⁷ and damage⁸ as a national priority and a basic condition for the

¹ Beniamino Caravita di Toritto, prominent constitutionalist, professor of institutions of public law at the University of Rome La Sapienza.

² Massimo Severo Giannini (Romë, 8 mars 1915 - Romë, 24 janar 2000) was a prominent Italian jurist and politician. He became a professor of administrative law at the age of 24, in 1939.

³ There are many scientific works and manuals that have dealt with the concept and protection of the environment. The most important ones that can be advised for scientific research in this field are: ANDRONIO A. – CECCHETTI M – GRASSI S. (a cura di), *Ambiente e diritto*, Voll. I-II, Firenze, 1999; CECCHETTI M., *Principi costituzionali per la tutela dell'ambiente*, Milano, 2000; GRASSI S., *Problemi di diritto costituzionale dell'ambiente*, Firenze, 2012; PENNASILICO M., *Manuale di diritto civile dell'ambiente*, Napoli, 2014; CROSETTI A. – FERRARA R. – FRACCHIA F – OLIVETTI RASON N., *Introduzione al diritto dell'ambiente*, Roma-Bari, 2018; LUGARESÌ N., *Diritto dell'ambiente*, Milano, 2020; FERRARA R. – FONDERICO F. – MILONE A., *Casi di diritto dell'ambiente*, Torino, 2021; NESPOR S. – RAMACCI L., *Codice dell'ambiente*, Milano, 2022.

⁴ In particular, natural beauty, historical centers, flora and fauna, forests.

⁵ Prevention of suppression of activities that lead to the degradation of land, air and terrestrial and marine waters.

⁶ Territorial planning problems such as identification of occupations, selection of locations for installations, identification of basins, settlement rules, etc.

⁷ According to the first paragraph, point 3 of L. 9 qeshor 2011, nr.10431, *Për mbrojtjen e mjedisit, environmental damage is: the damage done to the environment or the loss of the natural function of the component parts of the environment, caused by the loss of any of its components, by human interference with the connections of the components of the environment and/or the natural course of their development.*

⁸ According to the first paragraph, point 3 of L. 9 Qeshor 2011, nr.10431, *Për mbrojtjen e mjedisit, pollution is: the direct or indirect introduction, as a result of human activity, of substances, vibrations, radiation, unpleasant smells, heat or noise into the air, water or soil, to the extent that it can be harmful to the quality of the environment or human health, which may lead to damage to material property or worsen and interfere with the services and other legitimate uses of the environment.*

development of society (Shqipëri, Ligji Nr.10431/2011). But it should be noted that the first protection of the environment as an autonomous value and object of protection, as a prerequisite for human life and freedom, appeared in the context of international law, starting with the *Stockholm* declaration of 1972.⁹ More specifically, this statement in the preamble and its first principle emphasizes a close connection between human rights and environmental protection. In the preamble it is emphasized that both aspects of the human environment, the natural one and the one built by man, are essential for his well-being, as well as for the enjoyment of basic human rights, even for the right to live,¹⁰ while in its article 1 declares that man has the fundamental right to freedom, equality and adequate living conditions in an environment, the quality of which makes possible a life with dignity and well-being, and bears a solemn responsibility to protect and improve the environment for today's and future generations.¹¹ The concept of the environment has passed from an initial definition as a group of natural resources of the earth that must be protected according to the traditional technique of state responsibility to a concept of the common good of humanity that must be preserved and protected with valid rules *erga omnes*, in order to achieve in a concept of common interest in the face of biosphere risks that will be managed by assuming the collective responsibility necessary to face the consequences of the climate crisis (Grassi, 2023). The emergence of the term sustainable development as a guide in international law confirms the anthropocentric vision of the legal dimension of the environment (Grassi, 2023).

1.2 Constitution and environmental protection

The Constitution of the Republic of Albania, in the fourth chapter of the second part, dedicated to economic, social and cultural rights and freedoms, and in the fifth chapter of the same part, dedicated to social objectives, contains two provisions that are directly related to the environment and the protection of his. The Constitution in Article 56 sanctions that *everyone has the right to be informed about the state of the environment and its protection*, while in the letter d and dh of Article 59 it is determined that the State, within its constitutional powers and the means it has, aims... *a healthy and ecologically suitable environment for today's and future generations as well as the rational use of forests, waters, pastures and other natural resources based on the principle of sustainable development*. The first constitutional provision defines the right of every subject to be informed about the state of the environment and its protection, the right to be legitimized in the process of informing about the state of the environment as a fundamental and special procedural and material right. In relation to this, the Constitutional Court stated that: in addition to the right to be informed about the state of the environment, the constitutional provision of Article 56 also includes the right to be informed about its protection in terms of the measures taken or to be taken for this purpose. In the following, the Court emphasizes that in guaranteeing the right to information about the state of the environment, the transparency of the state authorities plays a special role by guaranteeing the public's access to information and its involvement in the activity processes that have an impact on the environment. According to the guardian of the Constitution, the right to information about the state of the environment affects the prevention of the irreversible situation in the framework of environmental protection, since the right to be informed about the state of the environment serves as a precautionary measure for its protection (Constitutional Court, Decision. Nr.30.2024). Another provision number 59 does not sanction a constitutional right of the individual but the social objectives of the Albanian state. The difference between constitutional rights and social objectives lies in the fact that the fulfillment of the latter cannot be requested directly in court (Albania, The Constitution of Albania, 1998).

Our constitution, regardless of the fact that it is a new and contemporary constitution, unfortunately has not directly sanctioned the right to the environment as a subjective right to have a healthy and clean environment, but treats it within the framework of the right to information and as a social objective. for the State to realize it within the financial possibilities it has. It should be noted that during the discussions on the drafting of the constitution, some experts in the field of the environment were of the opinion to treat the right of the environment as a subjective right of the person. Specifically, the chairman of the Association for the Protection of the Natural Environment in Albania proposed these amendments and additions to the drafting of the aforementioned provisions:

- Article 56 should be supplemented with this content in the first paragraph, everyone has the right to live in a healthy and ecologically suitable environment, as well as the duty to protect it, while the second paragraph

⁹ The *Stockholm Conference*, held from June 5 to 16, 1972, was attended by most of the members of the United Nations, i.e. 112 countries, as well as specialized agencies of the UN and other international organizations.

¹⁰ Point 1 of the Preamble of the *Stockholm Declaration* no: *Is the Human Right to Environment Recognized Under International Law? It Depends on the Source*, *Colorado Journal of International Environmental Law and Policy*, Vol.12:1, 2001 f.16-18.

¹¹ *Idem*.

had the same content as the provision has today 56.

- Regarding Article 59, it was proposed to remove point d and add a new provision with this content: *it is the State's responsibility to protect the environment from pollution and damage, through its bodies and supported by the public's participation, to take measures for the recovery of the damaged and polluted environment, to ensure the rational use of natural resources, ensuring the implementation of the principle of sustainable development.*

Although the proposed constitutional amendments represented a very important step considering the right to the environment as a subjective right, they were unfortunately not approved by the Constitutional Commission. I agree with the proposal of the proposing experts that those additions and amendments would make our Constitution more contemporary in the context of the importance of the worrisome issues related to the environment at that time. In essence, constitutional provision 59/e adapts the principle of development and use of natural resources, considering the needs of future generations. Since the Constitution was drawn up at the same time as the Aarhus Convention,¹² it adapted its basic principle, which deals with the right of the public to have information about the environment and its protection. It is understood that after the adoption of the Constitution in 1998, a number of legal and by-law acts were approved that aim to protect the environment from pollution and damage, as well as taking preventive and rehabilitative measures. However, in my opinion and that of some theoreticians in the field, the existence of a legal framework does not automatically guarantee the protection of the environment in practice. In Albania, but also in other developing countries, it is the peripheral communities that bear the consequences of environmental pollution and degradation of natural resources. Considering that Albania is a candidate country to join the European Union, I consider it reasonable to do a comparative review on the protection of the environment in the constitutions of some of the main European States.

2. Comparative Constitutional Overview on Environmental Protection

The constitutions of European countries adopted after the Second World War have not shown any special attention to the protection of the environment, with the exception of the constitutions adopted after 1975, such as that of Spain. The fact that these constitutions did not show any special protection to the environment at the time of approval in that period does not mean that they continued to be static in the initial predictions. These Constitutions have been amended over time by implementing special provisions for the protection of the environment.¹³

- *Environmental protection in the Italian Constitution*

In the Republic of Italy for a long time there has been a fundamental impossibility to define a complete configuration of a right for the protection of the environment where citizens as individuals or as a community could consider themselves as holders¹⁴ due to the theoretical-dogmatic dualism of focused on the contrast between the beauty of the landscape and economic development (Logroscino, 2022). The 1948 Constitution did not provide any specific protection for the environment, never mentioning the word environment in it, but it was the Constitutional Court that has continuously elaborated the concept of environmental protection over the years. The lack of a specific provision that gives full autonomy to the protection of the environment has been resolved through the expanded interpretation of Article 32¹⁵ and 9 of the Constitution. These constitutional provisions protect the right to health and the landscape.¹⁶ Recently, the constitutional provisions related to the protection of the environment (articles 9 and 41) have been revised with the constitutional law no. 1/2022. A third paragraph has been added to Article 9 which stipulates that: The Republic protects the environment, biodiversity and ecosystems, also in the interest of future generations. It should be noted that it is the first time since the adoption of the Constitution that the part of the basic principles has been interfered with, as happened with provision 9. The last revision of the Italian constitution with constitutional law no. 1/2022 elevated the protection of

¹² The Aarhus Convention was approved at the IV Ministerial Conference held on June 23-25, 1998, in the town of Aarhus, Denmark, under the authority of the European Economic Commission of the United Nations (UNECE). The Convention entered into force on October 30, 2001.

¹³ For example, in the Netherlands in 1983, in Germany in 1994 and in France in 2005.

¹⁴ To this right.

¹⁵ The Italian Constitution in its article 32 defines that: The Republic protects health as a fundamental right of the individual and the interest of the community and guarantees free treatment for the poor. No one can be forced to undergo a specific health treatment except by law.

¹⁶ LA TUTELA COSTITUZIONALE DELL'AMBIENTE NELLA RIFORMA DEGLI ARTICOLI 9 E 41 DELLA COSTITUZIONE: UNO SGUARDO AL RUOLO DELLE REGIONI E ALLE PROSPETTIVE DI ATTUAZIONE DEL REGIONALISMO DIFFERENZIATO GIOVANNI MOSCHELLA (Ordinary Professor of Institution of Public Law, Università degli Studi di Messina, Department of Political and Legal Sciences) f.639-640.

the environment to the principles that characterize the constitution, thus giving it the same value as the other basic principles (Morrone, 2022). The review of Article 41 determines that health and the environment are paradigms that must be protected by the economy, as well as security, freedom and human dignity (Italy, Constitution of Italy, 1948). A new limitation has been added to the second paragraph of Article 41. More specifically, before this provision provided that the economic initiative is free and cannot be developed in conflict with social benefit, or in such a way that it causes damage to security, freedom, human dignity.¹⁷ Now the economic initiative cannot be carried out in such a **way as to damage health and the environment**. The other modification of Article 41 has to do with adding to the third paragraph that the private or public initiative is also directed and coordinated for environmental purposes. Before the reform, this provision provided that the law defines the appropriate programs and controls so that public and private economic initiatives are oriented towards social goals. With the recent changes, environmental goals have been added to the social goals.

- *Environmental protection in the German constitution*

The German Federal Law in Article 20A defines that: The State also protects in its responsibility towards future generations the basic natural conditions of life [natürlichen Lebensgrundlagen] and animals through the exercise of legislative power, within the framework of the constitutional system, and executive and judicial power, in accordance with the law and right.¹⁸ As can be seen, the above-mentioned provision charges the State with the duty to protect the environment and, after the changes made in 2002, animals. This norm is very important because it places future generations, the natural element and animals in the center of attention. Even in this case, according to the doctrine, we are not facing a rule that recognizes a subjective right that can be sought in court, but we are dealing with a provision that defines an objective for the State and establishes a programmatic principle (Fracchia, 2023).

- *Protection of the environment in the Constitution of Spain.*

Environmental protection finds a strong and articulated anchoring in the 1978 constitution in Spain. Article 45 of this constitution provides that: *everyone has the right to use an environment suitable for personal development, as well as the duty to preserve it. Public authorities will ensure the rational use of all natural resources for the protection and improvement of the quality of life, the protection and restoration of the environment, relying on the necessary collective solidarity. For those who violate the provisions of the previous paragraph, criminal or, as the case may be, administrative sanctions will be imposed within the deadlines set by law, as well as the obligation to repair the damage caused.* As seen, this provision identifies first of all a right to an adequate environment for the development of the person. While the second paragraph refers to the role of public authorities in the management and protection of the environment. In the third paragraph, it constitutionalizes the principle of responsibility in environmental matters (Pantalone, 2023). According to the doctrine, the right to enjoy a suitable environment is not a subjective right that I can claim in the Court because it is in the third chapter of the Constitution where the *Principios rectores de la política social y económica* are sanctioned.¹⁹ But it is a programmatic principle of social and economic policy that requires concrete implementation at the legislative level for the configuration of a legal situation protected by the legal system (Fracchia, 2023). On the other hand, the Constitutional Court has observed that adequate environment is an undefined legal concept due to the cross-disciplinary and interdisciplinary nature in which it is conceived. For this reason, there is a need for concrete rules and measures that specify its content (Pantalone, 2023).

- *Environmental protection in England.*

In this relation, England was also taken as an example, despite the fact that it is not a part of the European Union, due to the specificity of environmental protection in this country. As for England, it should be noted that it does not have a written Constitution and therefore it is futile to look for constitutional principles in relation to the protection of the environment in a written document. They live in *case law*. The fact that there are no general and abstract principles in a written Constitution, or a specific code does not mean that important laws are missing, such as the *Environmental Protection Act* of 1990. In the range of sources of law in this country, the Police, national plans and directives have a very important role, because they are the main containers of the rules that make up environmental law and condition the work of local entities. This approach, according to the doctrine, gives the system a lot of flexibility, but at the same time decision-making is centralized to the detriment of individual decision-making or local entities (Fracchia, 2023).

- *Protection of the environment in the Constitution of France.*

As far as France is concerned, environmental protection is provided both in the Constitution and in a specific code.²⁰ The constitutionalization of environmental protection was achieved with the approval of the Environmental

¹⁷ Available before the reform.

¹⁸ The translation is the author's.

¹⁹ The guiding principles of social and economic policy.

²⁰ This code was approved in 2000 by the French legislature.

Charter, which was included in the preamble of the Constitution.²¹ In this case, he gave great importance to environmental principles, and along with rights,²² the importance of duties was also recognized.²³ So, as can be seen, we are dealing with a right-duty that sometimes leads to the affirmation of the principle that the polluter pays.

- *Protection of the environment in the Constitution of the Netherlands.*

Article 21 of the constitution provides for the right to have a healthy environment and charges state bodies with the duty to maintain the habitable landscape and to protect and improve the environment. Even in this case, it should be emphasized that the aforementioned provision does not attribute to the individual a fundamental subjective right, but forces the State to intervene in the realization of a suitable environment for living. It should be noted that the protection of the environment is directly or indirectly constitutionalized in many other European countries, such as: in Hungary (Hungary, The Constitution artt. 19-20), in Slovenia (Slovenia, The Constitution artt. 5, 67, 72, 73) in Slovakia (Slovakia, The Constitution, artt. 20, 23, 44, 45) in Romania (Romania, The Constitution, art. 35), in Portugal (Portugal, The Constitution, artt. 9, 52, 64, 66, 90), in Poland (Poloni, The Constitution, artt. 5, 31, 68, 74, 86), in Malta (Malta, The Constitution art. 9), in Luxembourg (Luxembourg, The Constitution art. 11-bis), in Lithuania (Lithuania, The Constitution artt. 53, 54), in Latvia (Latvia, The Constitution art.115), in Greece (Greece, The Constitution art. 24), in Finland (Finland, The Constitution art.20), in Estonia (Estonia, The Constitution artt. 34, 35), in Croatia (Croatia, The Constitution artt. 3, 15, 22, 70), in Bulgaria (Bulgaria, The Constitution art. 23), in Belgium (Belgium, The Constitution art. 23) etc.

3. Conclusions

The comparison conducted during this work revealed the presence of some "invariants" and the continuity of differences between different countries regarding environmental protection and conservation. The constitutionalism of environmental protection creates stronger guarantees than other legal mechanisms, and establishes a framework where environmental protection policies should be harmonized with economic developments and challenges. The constitutionalization of the environment is undoubtedly a step forward in guaranteeing a healthier life. Regardless of the form of the state, environmental protection constitutes an important event and has evolved over time, so the texts of the Constitutions of European states, which were adopted immediately after World War II, generally did not pay special attention to environmental protection. Some Constitutions make an exception here, among which is undoubtedly that of Albania, given that it is a new Constitution and is only 26 years old. The list of European states that guarantee environmental protection is quite extensive and the formulation of constitutional provisions is presented in different ways, which we can summarize as follows: a programmatic principle, a set objective for state action; a right to a healthy environment, regardless of whether or not it is raised to a subjective individual right, directly enforceable and subject to jurisdictional protection; a subjective right to the environment, considered in itself; a right-duty or a call for responsibility towards future generations. Over the past decades in Albania, short-term interests of entrepreneurship and economic development have seriously damaged the environment and natural resources. I believe that the moment has come for Albanian society and the political class to begin to face the ecological transition and to become aware of the necessity of harmonizing economic development with the protection of the right to a healthy environment for the present and the future. This could come by amending the constitution and considering environmental protection as a fundamental human right and not just as a programmatic principle of the State, as some European Union countries, to which Albania wants to join, have done. In my opinion, in the absence of the political will to amend the Constitution to consider environmental protection as a subjective right, it is up to the Constitutional Court to imitate its European counterparts. The latter have played a significant role in affirming this right, which is so important for the development of society, not only for the present but also for the future.

²¹ *The Preamble of the French Constitution states that: The French people solemnly declare their loyalty to the rights of man and the principles of national sovereignty established by the Declaration of 1789, confirmed and integrated by the preamble of the Constitution of 1946, as well as to rights and duties defined in the Environmental Charter of 2004. The underlining is the Author's.*

²² *Article 1 of the Environmental Charter states that: Every individual has the right to live in a balanced environment that is favorable for his/her health.*

²³ *Articles 2, 3, 4 of the Environmental Charter stipulate that: Every individual has the duty to participate in the protection and improvement of the environment. Each individual has the duty, within the deadlines set by law, to prevent or, in case of absence, to limit any damage that he himself would cause to the environment. Each individual must contribute to the repair of the damage caused to the environment, under the conditions established by law.*

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