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CONSEQUENCES OF THE INTRODUCTION OF ECOLOGICAL PERSPECTIVES IN LAW : COMPARATIVE ANALYSIS AND PROSPECTS FOR LEGAL STATUS FOR THE ENVIRONMENT

SUMMARY FINAL REPORT

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I. OBJECTIVES

The objectives of the research were to consider the complexity of the problematic of the environment at two levels. First, the description and explanation of the legal changes currently in progress; secondly, the formulation of alternative proposals and priorities for the development of legal policies on environmental matters.

The principal focus of the research was the clarification of the legal challenges involved in the construction of an environmental law. The evaluation of the results obtained over the last twenty years of law making can bring light to a certain number of structural weaknesses in environmental law. By studying experiences drawn from comparative law different possible conceptual bases for an environmental law, in fact a law for the environment, were studied in depth.

Several related tasks were pursued simultaneously with the principal objectives of :

1. Clarification of the state of the dialogue between legal experts and scientists in the development and implementation of legislation and procedures (such as impact studies) regarding the environment.

2. Clarification of the ethical foundations underlying a coherent rational legal policy for the environment. Evaluation of the advantages and disadvantages of devising such a policy for :
- the rights of mankind (present and future) or for the rights of nature itself;
- interests and rights (right to a clean, healthy environment) and duties and responsibilities (obligations towards the environment);
- the initiative of individuals and groups, and the intervention of public powers.

3. Clarification of how the public may participate in drawing up legislation, in the development of jurisprudence, and of the monitoring of provisions which are adopted. Suggestions to improve the conditions for popular participation (access to information, class actions, etc.).

4. Clarification of principles (prevention, precaution, responsibility) which sustain new developments in the field of environmental law.

II. METHODOLOGY

The methodology was be designed to ensure :

1. the interdisciplinary nature of the analysis, especially the dialogue between specialists in environmental law and legal theoreticians (legal philosophers, legal sociologists, etc.); and,

2. the supranational nature of the problem, which involves taking into consideration simultaneously international law, European law, and different national experiences.

The questionnaire was sent to 200 European specialists in environmental law (legal experts from universities, and also national and European administrations and large non-governmental organisations). The answers to the questionnaire were analysed and compared by the three teams; such answers have allowed a critical evaluation of current environmental law and to prepare for future discussion.
On the basis of the theoretical framework and questionnaire, a number of thematic reports was elaborated on the following topics :
a) law and science of the environment; b) "RES Communes"; c) environment and public domain; d) "*usufruit*" as a model of right of use of the environmental heritage; e) trust, trust-like devices and environmental protection; f) the role of general principles in environmental law; g) environmental damage; i) association and popular action for environment protection; h) market regulation through environmental law; m) contributions of the European Community to the development of environmental law.

III. MAIN RESULTS

(i) The failure of the objective and subjective approaches to protect the environment

Both objective and subjective approaches to protect the environment have been developed. Either there is an attempt to regulate the environment by means of authoritarian rules in public law, or on the other hand, it is claimed that the same results will ensure from granting fundamental subjective rights to the environment, through private property and the market. Both these approaches have failed to ensure efficient protection of the environment.

Since the beginning of the seventies, administrative environmental law has been developing. Twenty years on, the results of such law, bureaucratic and regulatory as it is, appear extremely disappointing. As a reaction to this, other - individualist and emphatically private - strategies are currently being proposed. Why not entrust the protection of the environment to private enterprise and the market ? Surely the owner is the best protector of his own property ? In putting a price tag on nature, surely the market will finally appreciate its value ? In the context of this enterprise culture, the right to negotiate norms with the authorities and new markets are created, like the sale of pollution permits implemented in the USA. However, also this private, subjectivist strategy presents problems (for example, concerning the pricing of environmental resources).

The protection of the environment therefore appears, once again, to insolve a dialectical strategy that shifts the classic boundaries between objective and subjective law, between public and private law.

(ii) A new law for the environment

A first consequence of the introduction of ecological perspectives in law is the development of procedural rights. What is needed in order to build up a legislation really able to deal with the environment are basic procedural rights as a new hybrid form, giving citizens a say in the management of the environment. These rights include the right to information, to consultation and of recourse to a court of law.

This movement on the subjective side also implies changes to objective law : environmental norms can become effective only if they have been formulated through negotiation between all the social actors involved : local authorities, firms, associations for the defence of nature. Not a take-it-or-leave-it negotiation, but a real procedural development of the law which, while maintaining as its aim the best possible defence of the environment, will incorporate different relevant points of view.

Another consequence of the introduction of ecological perspectives in law concerns the legal status of nature itself, increasingly treated as the "*common heritage*" of a nation or of humanity as a whole. The common heritage is as a way of regarding the environment as a hybrid form of subject and object concerns. On the one hand it covers a set of "*saleable*" objects, to which a money value may be attributed and which may be relinquished or transferred. But on the other hand it covers a set of symbolic values contributing to the common definition of group identity and group memory and which, in this sense, is "*unsaleable*". The idea of heritage is therefore a dialectical concept : as "*capital*" it needs to be conserved and protected as it is; insofar as it refers to the "*interest*" on this capital, the heritage may be managed with a view to consumption. Heritage is also dialectical in that it transcends the distinction between public and private. As a judicial characterisation based on concern for the common good, the idea of a heritage can be applied both to the public domain of the State and to private property. It is therefore not so much a question of "*expropriation*" as of "*transpropriation*"; the use made of the property is determined by common heritage considerations.

IV. SCIENTIFIC INTEREST AND POLICY RELEVANCE

(1) Scientific interest

A study concerning a theoretical approach to environmental law has been long awaited. The last years witnessed the publishing of hundreds of environmental law books and reviews; however, most of the current legal analysis has adopted a practical point of view. The aim of the research was to fill this gap.

(2) Policy relevance

Probably, this research will not have direct political consequences due to the fact that its approach is theoretical in substance. However, it could have some consequences on the legal thinking in the field of environmental law (for example, concerning issues of procedural rights in relation to the development of environmental liability provisions). The research was transnational and should be of particular interest to European civil servants and organizations.