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ENVIRONMENTAL PROTECTION FROM THE PERSPECTIVE OF THE SPANISH CONSTITUTIONAL COURT

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INTRODUCTION

Constitutional regulation of the environment is a development that began in the 1970s and, paradoxically, took place not in the countries most attuned to environmental issues, but in those whose transitions to democracy (Greece, Portugal and Spain) were accompanied by legislation addressing new realities, foremost among which was environmental concern.

The latest and most refined legal expression of environmental law is the recognition of an individual's right to enjoy a healthy environment. Provisions such as Article 45 of the Spanish Constitution or Article 66(1) of the Portuguese Constitution are now widely reflected in the constitutions of Latin American countries and in the most recent constitutions adopted in Europe.

Regardless of the effectiveness or practical application of many of these constitutional provisions, there can be no doubt that the right to a healthy environment has become firmly established as a so-called third-generation right, that is to say, a right based on solidarity or a collective right.

Nevertheless, despite international instruments and constitutional recognition, the debate on environmental protection remains open, as we seek new approaches to ensure its effective protection.

Furthermore, the global dimension of the problem is beginning to cast doubt on the effectiveness of national constitutions in protecting nature, which is why prominent figures such as Ferragiolli have called for the need for a Constitution of the Earth (*una Costituzione della Terra*).

THE ENSHRINEMENT OF THE RIGHT TO THE ENVIRONMENT IN THE SPANISH CONSTITUTION

THE CONCEPT OF THE ENVIRONMENT

In Spain, the environment is recognised in the Constitution under Article 45, paragraph 1, which establishes it as both a right and a duty, stating that “[e]veryone has the right to enjoy an environment suitable for personal development, as well as the duty to preserve it”. For its part, paragraph 2 of the same provision refers to the obligation to “preserve and restore the environment”, reaffirming the dual nature of this right, which emphasises the duty to preserve the environment —a duty incumbent upon public authorities, who “shall safeguard rational use of all natural resources”— since, ultimately, the quality of life of all members of society is at stake. Such protection and care shall be provided by those public authorities “by relying on essential collective solidarity”.

Under the Spanish constitutional framework, the environment can easily be classified as a “interrelated legal interest”, that is to say, one of those values, interests, relationships, rights or material or immaterial objects that are considered worthy of protection because they are vital or necessary for the well-being of citizens, whether individually or collectively. More specifically, reference has been made to a protected public interest or asset that directly benefits the community (Constitutional Court Judgments 32/1983 of 28 April 1983, 84/2013 of 11 April 2013, and 233/2015 of 5 November 2015, among others).

It follows from the foregoing that the Constitution recognises a right of all to the environment and, at the same time, a corresponding duty also incumbent upon all to safeguard and defend it. This duty falls not only, as has been noted, to the public authorities but also to the citizenry as a whole, from whom “indispensable solidarity” is required in the defence of a legal interest particularly worthy of protection, as it constitutes an indispensable factor in the “quality of life” of human beings, which is linked to the fundamental right to human dignity (Article 10 of the Spanish Constitution).

The first conclusion to be drawn from this constitutional provision is that the protection of the environment is a matter that concerns and falls within the remit of the public authorities. This concept is based on the theory of the “welfare state”,

which establishes the responsibility and role of the state in meeting and achieving social objectives, given that environmental degradation makes the environment a matter of public interest. Moreover, this approach will give environmental law a predominantly public character, as it regulates the relationship between humans and their environment, or the degradation of that environment caused by human activities.

The Constitutional Court has sought to define the scope that environmental protection should have from a constitutional perspective. Judgment No. 102/1995 of 26 June 1995 highlights the complex, multifaceted and “cross-cutting” nature of the environment, as it has an impact on other areas or sectors of the legal system.

With regard to its status under the Spanish Constitution, it must be stated that the right to a healthy environment is a subjective right of a constitutional nature, which is defined by law and enjoys ordinary judicial protection. In this sense, it is more than just a mere entitlement, in that it obliges the State to ensure the protection of the environment and grants citizens the right to call upon it. This protection can also be invoked against any private entity, including the legislature itself.

More recently, in Judgment 233/2015 of 5 November 2015 on the constitutionality of the Coastal Zone Act, the Court stated the following: “However, Article 45 of the Spanish Constitution sets out a governing principle, not a fundamental right. The courts must undoubtedly ensure respect for the environment, but ‘in accordance with the provisions of the laws’ implementing the constitutional provision [Art. 53(3) of the Spanish Constitution, Constitutional Court Judgment 32/1983, point of law 2, 149/1991, point of law 1, and 102/1995, points of law 4-7]” (CCJ 199/1996, point of law 3). In accordance with its advisory nature, it is the legislature that must determine the appropriate methods for giving effect to the governing principle of environmental protection (CCJ 84/2013 of 11 April 2013, point of law 6, and the cases cited therein).

The Court pointed out at an early stage that this does not mean that we are dealing with merely programmatic provisions, but rather that the “recognition, respect and protection” of the governing principles of social and economic policy set out in Chapter III of Title I shall inform “substantive legislation, judicial practice and

actions of the public authorities”, as required by Article 53(3) of the Constitution. This constitutional provision prevents such principles from being regarded as rules devoid of substance and requires them to be taken into account when interpreting both the other constitutional provisions and ordinary laws (CCJ 19/1982 of 5 May 1982, point of law 6). Or, to put it another way, “regardless of how general or specific their content may be, they set out binding propositions in terms that are unequivocally derived from Articles 9 and 53 of the Spanish Constitution” (CCJ 14/1992 of 10 February 1992, point of law 11).

THE ALLOCATION OF RESPONSIBILITIES IN ENVIRONMENTAL PROTECTION

Since environmental protection is defined as a public function, in Article 45(2) of the Constitution we must specify which public authorities are responsible for it, given that the Constitution itself sets out the framework of the autonomous regions by describing the distribution of powers between the State and the autonomous communities, without overlooking local authorities.

The first conclusion is that the provisions of Article 45 of the Spanish Constitution are binding on all public authorities, regardless of their territorial or functional remit.

Articles 148(1)(9) and 149(1)(23) of the Spanish Constitution establish a system for the allocation of powers between the State and the autonomous communities in environmental matters, under which the State is responsible for enacting basic legislation and the autonomous communities for managing and/or enacting additional protective measures. In principle, taking into account only the system established by the Spanish Constitution, there are three functions to be performed in relation to environmental matters: the enactment of basic legislation, the adoption of additional protection measures, and management. (CCJ 118/2017 of 19 October 2017, point of law 3).

CASE-LAW CRITERIA ESTABLISHED BY THE CONSTITUTIONAL COURT OF SPAIN

In this section, we will discuss the criteria established by the Constitutional Court regarding the characteristics and principles that define and underpin environmental law.

THE NON-REGRESSION PRINCIPLE IN ENVIRONMENTAL MATTERS

The non-regression principle states that environmental legislation and case-law should not be revised if this would result in a reduction in the levels of protection previously achieved.

This principle is set out and applied in CCJ 233/2015 of 5 November 2015.

THE PRECAUTIONARY PRINCIPLE

The precautionary principle, now established as another key principle of environmental law, emerged as a counterpoint to the general presumption in favour of development, according to which “where it is not known or certain that an activity [...] has negative impacts, the default conclusion is that the activity may proceed. This principle, as we shall see, will serve as the basis for political, regulatory and administrative decisions, and even judicial ones, and ultimately as a mechanism for controlling public discretion”.

One of the principles set out in this text is the precautionary principle, which was incorporated into the Treaty on European Union under Article 174 (now Article 191 of Treaty on the Functioning of the European Union).

It could be said that CCJs 237/2012 of 13 December 2012 and 19/2013 of 31 January 2013 marked the beginning of the application of the precautionary principle.

Subsequently, the recent CCJs 106/2014, 134/2014 and 57/2015, dated 18 March, regarding the use of fracking, state that the precautionary principle must be applied in the environmental assessment of each fracking project, so that, as is obvious, authorisation for a project involving the use of fracking will be refused if

the result of its environmental impact assessment is negative. However, it must be noted that, in such cases, the principle at stake would in fact be that of prevention.

THE RELATIONSHIP BETWEEN THE ENVIRONMENT AND PUBLIC HEALTH

There are many studies that show the link between environmental protection and human health.

This point has frequently been noted in the Constitutional Court's environmental case law. A prime example in this regard is CCJ 329/1993 (point of law 4), which states as follows: "it should be noted that, both in these international instruments and in Article 45 of the Spanish Constitution, the protection of the environment has as its ultimate objective and is closely linked to 'the protection of human health'". (CCJs 227/1988, point of law 27; 102/1995, points of law 5, 6 and 7; and 119/2001, points of law 5, 6 and 7, among others).

A NEW PERSPECTIVE ON ENVIRONMENTAL PROTECTION FROM CONSTITUTIONAL COURTS

The role of constitutional courts in protecting the environment has been characterised by numerous constraints. On the one hand, judges have been reluctant to make rulings in the absence of scientific evidence, despite the growing importance of the precautionary principle and the need for prevention. At the same time, it is evident how difficult it is to establish a genuine causal link between climate change and the violation of the rights that the courts are called upon to safeguard.

Given this reality, it is worth noting the shift in direction represented by the German Constitutional Court's judgment of 24 March 2021, in that it concludes that the fight against climate change not only has legal significance but that, on that basis, a state law may be deemed unconstitutional. In particular, the Court ruled that the "Bundes-Klimaschutzgesetz" of 12 December 2019 was unlawful, insofar as it did not consider the measures envisaged by the State to combat

climate change to be sufficient and adequate, such as the mere reduction of greenhouse gas emissions by 55% by 2030 (compared to 1990 levels).

The most interesting and innovative aspect of the judgment under consideration is the argument concerning the protection of future generations. The fact is that the judgment by the German constitutional judges certainly represents a significant step forward in research into the legal nature of what are known as the “rights of tomorrow”.

Along the same lines is the 2020 decision of the Conseil d’État in the case of “Commune de Grande-Synthe et autre” (427301), in which the French Government was required to demonstrate whether it could meet the emissions reduction targets by 2030.

In Spain, concerns regarding the risks of climate change are addressed in Judgment 233/2015, which states that: “The current situation is not characterised by the disappearance or drastic reduction of the risks identified at the time the aforementioned decisions were issued. Rather, it is characterised by the emergence of new concerns centred on the effects of climate change”.

THE PARADIGM SHIFT IN THE SPANISH CONSTITUTIONAL COURT’S APPROACH TO ENVIRONMENTAL MATTERS

Law 19/2022 of 30 September 2022, granting legal personality to the Mar Menor lagoon and its catchment area, represents a significant step forward in terms of nature conservation in Spain, as it establishes a new ecocentric paradigm within our legal system. The statement of legal grounds confirms that its adoption introduces “a new legal and political model” which is intended to give rise to an “eco-centric interpretation of our legal system”. The Constitutional Court handed down Judgment 142/2024, endorsing this significant amendment, which consists of the introduction for the first time into our legal system —and within the European framework— of what the judgment terms “moderate ecocentrism”.

Underlying the new regulations is a shift in the conception of the environment, which seeks to move away from the notion that it is protected and defended by and for humankind, within an anthropocentric view, regarding the environment

as a tool at the service of humankind, to an ecocentric stance, in which the intrinsic value of nature takes precedence—with humankind being merely one element forming part of it— such that constraints on the environment depend on its very capacity to meet present and future needs. This view advocates for the recognition of nature’s rights.

The judgment recognises the significance of the legislation under review and the novelty of granting legal personality to natural entities, stating that:

“In this context, Law 19/2022 of 30 September 2022, granting legal personality to the Mar Menor lagoon and its catchment area, is the first Euro-Mediterranean piece of legislation to follow the model that attributes legal personality to natural entities. By processing and ultimately approving the citizens’ legislative initiative that gave rise to this provision, the legislature has a shift in the paradigm of protection from the most traditional anthropocentrism to a moderate ecocentrism”.

The Constitutional Court states that Article 45 of the Spanish Constitution does not exclude any mechanism for environmental protection. It is a broad principle that allows for all kinds of legal remedies, stating that: “This provision does not contain a definitive, rigid or exclusive definition of the legal mechanisms for the protection, defence and restoration, where appropriate, of natural areas. Consequently, we cannot interpret it, as a matter of principle, to mean that any legal mechanism that may be developed over time, and the evolution of legal theory, is excluded from the constitutional model of environmental protection, provided that it respects the aim of protecting and improving the quality of life and of defending and restoring the natural environment in which life takes place.”

THE RIGHTS OF FUTURE GENERATIONS

Art. 20a of the Basic Law for the Federal Republic of Germany establishes that: “Mindful also of its responsibility towards future generations, the state shall protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by executive and judicial action, all within the

framework of the constitutional order.” For its part, Article 9 of the Italian Constitution states the following: The Republic shall [...] “safeguard the natural beauties and the historical and artistic heritage of the Nation. It shall safeguard the environment, biodiversity and ecosystems, also in the interest of future generations. State law shall regulate the methods and means of safeguarding animals.”

The rights of future generations have long been overlooked in the analysis and implementation of human rights. Neither the Universal Declaration of Human Rights nor any other human rights instrument contains a time-limited restriction or limits rights to the present moment. As a society, we must understand that the decisions we make today can have a profound impact on the lives and rights of those who will be born in years, decades or even centuries to come, and that it is unethical to place less value on the lives and rights of the human beings who will inhabit the Earth in the future than on the lives and rights of current generations. Those who have not yet been born cannot defend themselves, and so, little by little, intergenerational justice has moved beyond the moral debate to become a matter of legal debate. Legislative policies must not only be capable of projecting current interests into the future, but should also address the need to manage the demands that the future places on the present (Revo Sustainable Prosperity).

We are hearing more and more about the rights of future generations, but from a legal perspective, this concept presents problems that require a consistent response.

Firstly, reference is being made to existing subjective rights without existing rights-holders, which is a massive contradiction in terms, or to the obligation to respect today rights that will only come into being in the future —that is, at some more or less uncertain point in time (Torres del Moral). In response to this assertion, it is argued that “future generations may well be the holders of rights, whilst present generations are the bearers of obligations towards them.

Rights may exist without there being a rights holder, which therefore justifies legal protection for future generations”.

In short, it is argued that “future generations are a prime example of what we might call ‘legal fiction’”.

Secondly, the introduction of the rights of future generations represents a shift in the philosophy underpinning the work of the courts. As Judge Michel Pinaut puts it, “Until now, the judge was a judge of current disputes, a judge of the present. During the trial, he or she had before them victims or claimants with specific grievances against the actions or conduct of another individual or legal entity who was also present ... Now, through the rights of future generations, the judge becomes the judge of the future”.

In connection with the above, we must determine who is entitled to exercise those rights on behalf of future generations.

To quote Michel Pinaut once again: “As for the other aspect of representation — that is, who speaks on behalf of future generations— solutions are easier to find. In a representative democracy, the government and parliament, elected by the people, represent the nation and make decisions on its behalf, for the past, the present and the future. But, of course, democracy works in such a way that the interests, concerns and demands of the present tend to take precedence over long-term prospects, even the most alarming ones.

More innovative solutions have been proposed (understandably without success so far), such as a ‘citizens’ assembly for the future’, the creation of an ‘ombudsman for the future’ or, in France, the expansion of the powers of the Economic, Social and Environmental Council (ESEC) to create a Chamber of the Future. These are stimulating ideas, but their apparent obviousness is undoubtedly too simplistic”.

It is worth recalling that in 2023, six young Portuguese people brought a case against Portugal and 32 other European countries before the European Court of Human Rights (ECHR) on the grounds of climate inaction, arguing that this violated their fundamental rights to life and privacy due to the impacts of climate change. In April 2024, the Grand Chamber of the European Court of Human Rights unanimously dismissed the application, citing a failure to exhaust domestic remedies; in other words, the application was not decided on the basis of the young people’s standing or legitimacy, but on the grounds that domestic legal remedies had not been exhausted.