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# **Environmental Protection**

**and**

# **the Right to Health**

**by**  
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# Environmental protection and the right to health

## 1 Introduction

The outburst of an ecological conscience in the eighties and nineties lead to a new ideology and most of political parties have integrated environmental protection policies in their agenda. Politicians and civil society alike understood that the destruction of the habitat was no longer a localised concern but one that affects everyone.

Issues such as rapid deforestation, the greenhouse effect, residues, loss of biodiversity, soil degradation, desertification or water pollution gave rise to a new social awareness. The need for an equilibrium between economic growth and protecting natural resources created an idea of sustainability which must prevail in any economic model.

The deep and close relationship between anti-environmental practices and public health is calling forth increasing levels of the world population's participation and knowledge.

In order to make sure that economic growth does not jeopardise life on earth it is vital to turn to the Law and to lawyers.

Portuguese Law regulates the environment in two separate but cumulative ways: on the one hand, it is as a whole considered an unitary legal object, and on the other hand it is regulated on its diverse components, such as air, water, soil, fauna, flora and subsoil.

Environmental Law is conceived as a system of rules of law which places Man at its centre and aims at preserving nature, sustaining ecological balances, safeguarding genetic heritages, protecting natural resources and fighting against pollution.

Thus Environmental Law has specific characteristics which render it rather unique compared to other branches of the Law. It is **new Law**, made of recent and non-codified rules. One of its main traits is a brand new philosophy, in as much as it does not regulate relationships between human beings but those of Man towards nature.

Environmental Law is thus a new, innovative and **autonomous** subject. The aforementioned legal object – the environment – is self-governed. Its autonomy is expressed on the self-sufficiency of Environmental Law principles, and on new legal instruments to evaluate environmental impact, plans, action programmes and planning contracts.

However, such **autonomy** is **relative**, for it realms on classical concepts and tools used by traditional branches of the law and resorts to Administrative Law rules.

Environmental Law implies reviewing classical institutions, techniques and tools used on other branches of the law, which should be directed towards protecting an environment capable of securing sound and ecologically balanced human life.

**Interdisciplinarity** makes for another Environmental Law trait. The interdisciplinary nature of environmental issues raised the need for collaboration between jurists and other specialists.

One must also point out the **horizontality**, or transversality, of this branch of the law. Due to its horizontality, there are many detached, quaint and isolated rules in bills aimed at regulating various aspects of life in society and human activities on fields such as economics, sanitary issues, urbanism and cultural heritage.

This kind of Law is also focused on mutual help amongst Constitutional, Civil, Penal and Administrative law.

Environmental law is about **radical intervention**, because it must address the root of things. It must address the root of pollution, taking action in all of its fronts.

Environmental law is **open** to citizens' and ONGs' knowledge, and must be able to guarantee informed participation and set devices for popular action in protecting related objects.

It is **strategic** because it increasingly aims at fulfilling its objectives through planning and programming.

Environmental law is global, **planetary law**, as it relies on interdependency between men and regions and implies, therefore, a global approach.

## **2 Environmental damage and public health consequences**

There is a straight link between man-caused damage to the environment and public health.

3000.000 people die every year due to pollution and it is predictable that one quarter of all biodiversity shall die in the next 15 to 30 years.

Rain forest will vanish by mid-21<sup>st</sup> century, and 10% of all arable soil was already turned into desert. We know that 60% of the world population lives on urban settlements with more than 10.000 inhabitants, and are aware of the problems caused by such human concentration.

A growing portion of the world population breaths polluted air and drinks water with quality levels bellow the minimum requirements.

The destruction of the ozone layer has had effects on the densely populated developed world, bringing forth diseases such as skin cancer (which affects whites mainly), eye injuries and immune system insufficiencies.

In Portugal, environmental problems reach in certain areas levels far beyond those accepted in a developed country.

The degradation of rivers such as Ave, Leça or Trancão and pollution levels in some coastal areas (such as in Matosinhos) have serious human consequences.

Water polluted with highly toxic substances and the final destination of domestic debris cause serious damage to the people affected on a daily basis.

One of the main factors leading to the decay of quality of life is noise or sound pollution, which should be carefully considered on an environmental health context.

It is feasible to prove the existence of higher blood pressure levels in people living close to high traffic areas.

Noise has a direct impact on the quality of home life, leading to stress and insomnia.

The general scheme for fighting noise pollution was rendered effective in Portuguese legal system with the Decree no 292/2000, from 14<sup>th</sup> September, updated by the Decree no 252/2002, from 23<sup>rd</sup> September.

Damages to public health caused by indiscriminate and uncontrolled accumulation of residues is well reported, but the links to disease are not always easy to prove and demonstrate.

Residues cause disease growth and spreading, mainly through elimination procedures.

Residues Common Law is established on Decree-Law no 239/97, from 9<sup>th</sup> September.

The link between man-caused damage to the environment and its consequences to public health created a growing need for awareness regarding the means available for the people to stand up for their rights – and in the Portuguese legal system there are plenty.

### **3 Environmental Law and Portuguese National Law**

Environmental Law as a concept was first referred to in the 1976 Portuguese Constitution, where is it simultaneously mentioned as a State duty and as a people's fundamental right.

Articles 9(e) and 66(2) of the Portuguese Constitution establish as a State duty ensuring the effectiveness of environmental rights, the protection of nature and the environment, the conservation of natural resources and the guaranteeing of proper spatial planning.

The right to the environment is autonomous to other rights, such as the right to live, the right to health or the right to hold property.

It has a positive edge while it urges the State not to harm the environment and to bring forth action aimed at its defence and protection.

But it has also a negative one when it enforces everybody's duty not to pollute and to stop others from polluting, making the State responsible for acting towards defending environmental rights.

This law applies not only to individuals, but it also implies the State's abstention in environmental hazards.

The constitution establishes the environment as a fundamental right of every citizen when it states on article 66(1) that "everybody is entitled to a sound and ecologically balanced human environment and has the obligation to protect it".

The environment is protected by rules which lay down fundamental rights and is put forward as a fundamental people's right.

By stating such subjective right to the environment, the right to resort to law and court to ensure its fulfilment is established.

Citizens may act on their own behalf resorting to the court when their right is violated by other individuals or by public entities.

The right to the environment is articulated with the right to effective judicial protection.

According to what is written on article 20(1) of the Portuguese Constitution, "Everybody's right to resort to court to defend their legal rights and interests is secured".

This guarantee is labelled as the right to effective judicial protection.

The access to justice is the main means to defend fundamental rights.

This right to juridical protection was also stated on article 268 (4) and (5) of our supreme Law.

Each time a citizen feels its right to the environment was challenged he has the right to access common and administrative courts in order to reclaim the protection of his fundamental right.

The Constitution allows for yet another means of supervising the Judicial protection of the environment and of quality of life, namely the right to popular action.

On its article 52(3)(a) the Constitution grants every citizen the right to take popular action in order to "promote prevention, ceasing, or judicial prosecution of offences against... the quality of life and the protection of the environment and cultural heritage".

The right to popular action was regulated in Portuguese by Law no 83/95, from 31<sup>st</sup> August.

This right to prevent and control environmental offences materializes the principle of environmental democracy, allowing each individual to demand through the various avenues of legal redress that his right to the environment is respected.

It is a right that belongs to every single citizen, regardless of his or her concrete, patrimonial or personal relationship to the environmental object he wishes to protect, which is deeply innovative in constitutional terms.

In accordance to what is established by the Constitution, Basic Law on the Environment, passed by Law no 11/87, from 7<sup>th</sup> April, lays down the specific principles for the defence and protection of the environment that entail public and private entities.

The aims of the Basic Law on the Environment cover the settling of the great guidance lines for and environmental policy, thus accomplishing the rules mentioned on articles 9 and 66 of the Constitution.

**The principle of prevention** is established on article 3(a) of the Basic Law on the Environment, mentioning that it is essential that "actions with immediate effect or an effect in time on the environment are thought of in advance". Article 66(2)(a) stipulates that the State is in charge of "preventing and controlling pollution and its consequences as well as all damaging types of erosion".

Preventing environmental damage can only be accomplished by resorting to Administrative Law tools like designating special protection areas such as national agricultural reserves or national ecological reserves or natural parks and reserves, the use of authorizations and licenses, economic incentives and the Institute for the Assessment of Environmental Impact.

The principle of prevention is one of the most important ones in Environmental Law.

As we have mentioned it, we ought to highlight the significance of the Institute for the Assessment of Environmental Impact, created by the European Community by Directive no 85/337/CEE.

It is a prior procedure that sustains the decision to authorize or license projects likely to have significant environmental impact and is aimed at providing the competent bodies enough information and data to enable awareness and ponderation of the projects' environmental effects.

The decree that includes the scheme for accessing environmental impact is the Decree no 69/2000, from 3<sup>rd</sup> May.

Another principle in environmental law is the **principle of precaution**.

This principle is closely linked to that of prevention. In cases of doubt the environment must prevail when there is uncertainty or lack of scientific evidence to back the environmental innocuity of a given behaviour.

The burden of proof of the causal link between the polluting source and the environmental injury is transferred to the potential polluter, who must prove that his activities do not cause environmental harm.

Closely related to the principle mentioned above is that of *in dubio pro ambiente*. This principle implies that the environment must prevail whenever there are doubts about the environmental hazard of a given activity.

Another relevant principle is the **polluter-pays principle**, established on the end of article 3(a) of the Basic Law on the Environment, where it is stated that "the polluter is compelled to correct or salvage the environment, paying for all the expenses, and is not allowed to carry on with the polluting procedure."

This principle is related to the idea of **responsabilisation** mentioned on article 3(h).

The polluter shall pay for the measures adopted to protect the environment and also for any action taken by public powers to deal with polluting activities.

This principle is related to the idea of redistributing the costs of fighting against pollution.

The **principle of participation** is established on article 3(c) of the Basic Law, as well as on article 267(5) of our Supreme Law.

The need to have the various social organisations intervening on the decision making process is felt on the environmental field too.

Citizens must take part on the formulation and carrying out of environment policies. Protecting nature should not fall only on the State's shoulders, and we all must participate.

There are other relevant principles for environmental law, such as the **principle of correcting at the source**, the **principle of balance**, the **principle of international cooperation**, and that of **unity on managing and acting**.

The first compels the polluter to correct and take appropriate measures to protect the environment and is established on article 130 of the European Union Treaty.

The **Principle of balance** is detailed on article 3(b) of Basic Law on the Environment.

The **principle of international cooperation** is stated on article 3(e) of the law mentioned above. The protection of the environment is not the task of a sole State but of various States, for this is the only way to accomplish the objective of successfully protecting the environment.

The **principle of unity on managing and acting** established on article 3(d) of the Basic Law on the Environment, mentions the need for a national body responsible for environmental policy and spatial planning. In Portugal such body in charge of securing unity on managing and acting is the Ministry for the Environment and Spatial Planning.

With regards to autonomous administration, there are regional authorities and the Autonomous Regions of Azores and Madeira.

#### **4 Avenues of legal Redress of the fundamental right to the environment**

In Portugal the State is in charge of protecting the legal order.

The State apparatus is composed by the courts on the one hand and the administration on the other.

The protection of a right might be judicial or administrative. The administration is responsible for the effectiveness of collective interests, such as environmental ones.

Inside the administration, citizens may resort to the *ombudsman*, which is an independent constitutional body whose duty is to promote the administrative warrant of individuals' rights and interests (article 23 of the Constitution).

Another possibility is to resort to the Public Prosecutor, which may lodge actions aimed at securing democratic equality.

Citizens also have the option of going to court to defend their environmental rights, for they are the best means to do so.

#### **5 The role of Public Administration in defending the environment**

Environmental policies must be the outcome of the initiative and action of different bodies and agencies in society – civil society should be encouraged to participate. Public Administration's role in defending and stimulating the environment is paramount.

Such defence and stimulus imply the need for harmonized action from the different sectors of Public Administration, in agreement with the contents of the principle of cooperation.

Local councils are the best bodies to defend the unique and limited nature objects.

Administrative action taken by Public Administration may be of very different nature, so we will highlight the following:

First of all they may be controlling acts or preventive surveillance acts, such as licenses and authorizations.

In Portuguese Law the administrative acts with deeper impact on the environment are authoritative or licensor acts.

Administrative acts may be statements with specific juridical value in public domain but may also concede especial judicial schemes to certain objects, as in classifying cultural ones.

Other administrative acts include prohibitions, stimulating administrative acts such as subventions, special credit, exemptions and other tax incentives.

Sanctionary acts are amongst the administrative acts carried out by the administration the ones with further direct or indirect impact on the environment. Decree no 433/82, from 27<sup>th</sup> October, updated by Decree no 356/89, from 17<sup>th</sup> November and by Decree no 244/95, from 14<sup>th</sup> September and by Law 106/01, from 24<sup>th</sup> December, lays down the fines.

Local councils are amongst the best entities to process and carry out fines, for they are competent to do so on many environmental issues.

In Portugal local councils are considered not only environmental defenders and promoters, they also come out as potential aggressors and the cause behind people's health hazards, due to omission on cases of surveillance, seizures or penalties or when illegal administrative acts are committed, such as against the law licensing or lack of assessment of environmental impacts.

The Local Authorities Law grants local powers the role of defending and protecting the environment and the quality of life of their populations.

Law 159/99, from 14<sup>th</sup> September, sets up the framework of attributes and competences for local councils and Law 169/99, from 18<sup>th</sup> September, the judicial scheme regulating municipal and parish bodies.

Their responsibilities touch on almost every single aspect of environmental management, spatial planning, soil management, implantation and placing of productive activities, safeguarding of environmental and landscape values.

They play a paramount role as far as being close to the people is concern, due to proximity and the representativeness it confers.

## **6 Criticism and measures put forward to reinforce environmental protection on the Portuguese judicial system**

National legislation as far as responsibility is concern does not seem to be able to solve most of the damage caused by accumulated environmental burdens and ecological damage caused by generalized pollution.

The Portuguese responsibility system for environmental and ecological damage is incomplete because there are a number of issues such as proving the causal link, imputation concourse, access to information, or concourse between compensation claims, which lack precise answers.

It is important to find complementary solutions for responsibility mechanisms based on the principle of responsabilisation, the principle of communitarian repartition or, as far as individual loss is concerned, on the basic rule of the affected party having its losses accounted for.



I suggest the setting of collective compensation funds, fees or ecological taxes. Specific funding to local authorities must be included in Portuguese judicial system, so that they can effectively carry out their duties on the environmental field. Otherwise, the need for funding and the demand of other policies (such as employment) might lead these authorities to promote economic activity which brings about economical gains alongside with environmental hazards, such as urbanistic construction.

I stand for sustained regional growth, thus avoiding the "diseconomies" of highly populated areas such as Lisbon and Oporto, because it is the only means to achieve a better exploitation of all available resources. Human and service congestion such as we see in Lisbon and Oporto is very expansive.

The solution is to invest on balanced promotion of medium size urban gatherings capable of providing the people with acceptable levels of economic demand and well-being.

When staying in their birth places, workers must keep on living on owned accommodation and have access to farm land, in order to reduce housing and feeding costs and pollution.

It is paramount that Lisbon and Oporto keep a reasonable size in order to secure their inhabitants a good quality of life – and that is not the case at the moment.

Public services must be close to the citizens, even if their structure needs to unfold. Proximity allows for higher flexibility and a better adjustment to the issues to be handled.

This closeness does not go against reducing centralised services and agencies, which will cause a decrease in public spending and higher efficiency, because bureaucracy costs are avoided and a better balance between the country's regions is achieved.

Local authorities' budgets for environmental issues must rise, so that specialists and managers are educated to sensitize the people for the need for prevention in environmental and spatial planning matters.

It is advisable that coordination between the Ministry for the Environment and Portuguese local authorities is improved, which has not been put into practice, in order to render existing directives more efficient.

The lack of unity in civil responsibility on environmental issues must come to an end because it creates legislation made of bits and pieces and a judicial labyrinth. Such incoherence prevents the materialization of the principle of responsabilisation.

Making local councils and their public servants accountable for acts causing damage on the environment must be the rule and not a feeble exception, for that is the only way to bring forward a change in the mentalities and a new responsabilisation policy.

New solutions and new practices must be found, which must embody reformulating the objectives and methods of enterprises, re-thinking the ethical

boundaries of economical agents, establishing civil responsibility insurances for environmental damage, locate those sums to environmental protection investment, correcting the distortion in national accounts aiming at incorporating environmental losses, promoting green products, considering the whole production cycle and its consequences.

Portugal has one of the most advanced environmental legislation in the world, but it is not successful on the whole, because there is no surveillance. That surveillance must be carried out by all of us and not exclusively by public bodies.

The fascist regime that ruled Portugal for 48 years seriously injured civil society in the country – and that injury can still be seen on the lack of participative awareness. An environmental State of law can only be achieved with the people's care and participation. Protecting the environment is not just a right but also a duty enforced by the Constitution and we must therefore abide by it.

We all must avoid and protest against any offences to the environment because they are an attack on human rights and the chances of survival of the human race.

Portuguese civil society must "wake up" and step in making the environment in which we live better, promoting the quality and quantity of green areas in urban areas, defending the ones that already exist, the salubrity of the quality of the air we breath, the quality of the water we drink, the levels of noise we are daily subjected to, the quality of our wonderful beaches, the suitability of the better urbanist options and the maintenance of our natural and cultural heritage.

The environment ought not to be a lesser worry for the Government and local authorities. It must be behind the framework of public bodies' action, which must not be constantly modified in accordance to party politics, for by doing so we are putting our future in jeopardy.

We must have a global vision and follow the aphorism "think globally, act locally" so that people's trust is restored. The protection of the environment depends upon the will and responsibility of each one of us.

Environmental Law will be the most important of human rights by the end of the 21<sup>st</sup> century, since humanity's main right – the right to life – is under threat.

But as Democritus would say, **"one must be zealous about acting, not talking"**.

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## BIBLIOGRAPHY

Amaral, Freitas do Amaral, "Direito Administrativo" ,Lisboa, volume 1, 2, 3, 1998

Amaral, Diogo Freitas do Amaral, João Caupers, João Martins Claro, João Raposo, Maria da Glória Dias Garcia, Pedro Siza Vieira, Vasco Pereira da Silva, " Código de Procedimento Administrativo", Almedina, 4<sup>a</sup>. Edição

Aragão, Maria Alexandra de Sousa, " Direito dos Resíduos", Cadernos Cedoua, Almedina, 2003

Carvalho, Raquel," Leis fundamentais do Direito do Ambiente", Universidade Católica Portuguesa do Porto, 2<sup>a</sup>. Edição, 1999

Constituição da República Portuguesa, Almedina, 2002

Condesso, Fernando dos Reis, " Direito do Ambiente", Almedina, 2001

Correia, Fernando Alves, " Direito do Ordenamento do Território e do Urbanismo", Almedina, 4<sup>a</sup>. Edição, 2001

Delgado, Ana Alvoeiro, Ana Margarida Cunha Ribeiro, " Regime Jurídico dos Instrumentos de Gestão Territorial", Coimbra Editora, 2001.

Dias, José Eduardo Figueiredo, "Direito Constitucional e Administrativo do Ambiente", Cadernos Cedoua, Almedina, 2001

Dias, José Eduardo Figueiredo, Joana Maria Pereira Mendes, " Legislação Ambiental", Coimbra Editora, 2<sup>a</sup>. Edição, 2000

Gomes, Carla Amado, " A prevenção à prova no Direito do Ambiente", Coimbra Editora.

Lopes, Maria Adília, Paula Gaspar, " O acesso à informação e a participação em matéria de ambiente", Instituto de Promoção Ambiental, Lisboa, 1993

Nabais, José Casalta, " Noção e âmbito do Direito do Património Cultural", Revista do Centro de Estudos de Direito do Ordenamento, do Urbanismo e do Ambiente, 2000.

Oliveira, Fernanda Paula, " Direito do Ordenamento do Território", Cadernos Cedoua, Almedina, 2002.

Pereira, António Beça, " Regime Geral das Contra-ordenações e Coimas", Almedina, 3ª. Edição

Porto, Manuel Carlos Lopes, " O ordenamento do Território face aos desafios da Competitividade", Almedina, 1996

Sendim, José de Sousa Cunhal, " Guia Ambiental do Cidadão", Dom Quixote, 2002

Sendim, José de Sousa Cunhal, " Responsabilidade Civil por danos ecológicos", Cadernos Cedoua, Almedina, 2002

Santos, J.A, " Poluição Sonora- Novo Regime Legal", Dislivro, 2002

Vasco Pereira da Silva, " Verdes são também os Direitos do Homem", Principia, 2000

Soares, Cláudia Dias " O Direito Fiscal do Ambiente", Cadernos Cedoua, Almedina, 2003

Soares, Cláudia Dias " O imposto Ambiental", Cadernos Cedoua, Almedina, 2002.