

An opulent and powerless regulatory landscape for declining biodiversity

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Environmental standards are proliferating everywhere, yet biodiversity is declining. Over the last fifty years or so, international, European and national standards have been adopted to substantiate mankind's responsibility towards the environment and to reconcile human activities with its protection. One fact is widely acknowledged : the loss of biodiversity is proceeding with great strides. While some legal advances have been made, the proliferation of environmental standards does not appear to benefit either the environment or the law overall.

Environmental law was born in the 1970s. Over the past fifty years or so, growing awareness of the need to protect the environment has led to a proliferation of standards, to the extent that environmental law now legislates an ever-increasing number of human activities in the fields of industry, agriculture, energy production, waste management and so on.

An abundant production of standards

The abundant production of standards affects the international, European and national levels. At international level, for example, more than 300 multilateral conventions or treaties have been adopted, one of the most recent being the treaty to protect marine biodiversity in the high seas and one of the best known being the Convention on Biological Diversity. According to the foreword to this convention, "the preservation of biological diversity is a common concern of humankind". In addition to these legally binding texts, there are a multitude of non-legally binding texts (declarations, resolutions, strategies, etc.).

All these standards are essentially aimed at limiting the rights of those who use and/or appropriate natural resources, whether by protecting specific species and areas or, following a global approach, biodiversity, i.e. living organisms as a whole. Ambitious standards have been adopted to prevent international trade of endangered species, to preserve migratory species or wetlands, or to reduce the use of pesticides, etc. In France, in 2016, the law for the reconquest of biodiversity, nature and landscapes enshrined the principle of non-regression in law. According to this principle, "*environmental protection, ensured by legislative and regulatory provisions relating to the environment, can only be subject to constant improvement, taking into account current scientific and technical knowledge*". This principle applies only to the regulatory authority and not to the legislative authority, but it has already been applied, albeit with some nuance, by the administrative courts. Other principles characterise environmental law (see box).

Omnipresence of the precautionary principle

One of the main principles of environmental law is the precautionary principle. It has been enshrined at European Union level (Maastricht Treaty), at international level (Rio Declaration and Convention on Biological Diversity, among others) and has been incorporated into French law ("Code de l'environnement", then "Charte de l'environnement" with constitutional value). According to this principle, the absence of knowledge about the exact short- or long-term consequences of certain actions should not be used as a pretext for postponing the adoption of measures to prevent environmental degradation. The precautionary principle has become the cornerstone of GMO regulation. In France, the Conseil d'Etat referred to it for the first time in 1998 in connection with transgenic maize varieties. Recently, the Court of Justice of the European Union used this principle to rule that Member States cannot authorise the marketing of seeds treated with products (neonicotinoids) that have been banned by a regulatory act of the European Commission. The derogations granted by the French government for sugar beet cultivation in 2021 and 2022 were therefore illegal.

Inefficient standards on the whole

Few human activities are now exempt from the requirements of environmental conditionality. This is one of the consequences of the principle of integration stated in the Rio Declaration, according to which environmental protection must be integrated into other policies. At European Union level, "*environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development*" (Article 11 of the Treaty on the Functioning of the European Union).

But despite the recognition of the principle of integration, the profusion of environmental standards, the 26,935 Natura 2000 sites in the European Union, including 1,753 in France (in December 2021), etc., human activity continues to fuel the worrying pace at which the fauna, flora and habitats are disappearing. In France, the latest report on the state of the environment, published by the Ministry of Ecological Transition and Solidarity, shows that between 1998 and 2018, the abundance of birds specialising in agricultural environments fell by 38%. On a global scale, the latest scientific report from the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES) also makes an alarming observation : 1 million plant and animal species are endangered. The loss of diversity is also affecting local varieties and breeds of domesticated plants and animals. As for micro-organisms, the evolution of their diversity remains a black hole of knowledge.

Provisions that are too complex, delays in adopting national transposition measures or implementing decrees, principles that have no legal effect, non-compliance with the law, inadequate penalties for non-compliance with the rules, insufficient monitoring and control resources... these are just some of the reasons that can explain, from a legal point of view, the ineffectiveness of environmental standards. But all these reasons are above all indicative of a political will that bows to economic interests, whether defended by companies or by economically powerful states against weaker states.

Biodiversity dependant on economic interests

Economic logic is interfering in the very architecture of environmental standards. A good example of this are the various compensation mechanisms, such as the one applied to greenhouse gas emissions or the "Avoid, Reduce, Compensate" (ARC) sequence. Behind this formula lies an accounting approach : a company can destroy an ecosystem to build a factory if it contributes financially to restoring or protecting another ecosystem. The aim is therefore to define the rights of those who wish to exploit natural resources within the limits of what is acceptable... for economic activities. This type of mechanism leads to a reasoning similar to that of a criminal : will not respecting the environment cost me more or less than respecting it ? While the ARC sequence aims for no net loss or even a gain in biodiversity, in practice it is unbalanced in favour of compensation that is necessarily not equivalent to the ecosystem destroyed.

Very often, environmental standards help to create a market (the carbon market, for example) or seek to create favourable regulatory conditions for the development of new pockets of growth, under the false pretext of protecting the environment. This is the case, for example, with "*new* GMOs". The European Commission has justified the need to adopt more flexible rules for these GMOs on the grounds of their supposed ability to reduce the amount of water and pesticides used, to adapt to climate change, and so on. The legislative proposal that the European executive plans to put forward is in line with its "Green Pact" and its "Farm to Fork" strategy.

Despite their profusion, the environmental standards, which are obviously not all to be dismissed, are not succeeding in halting the loss of biodiversity. Beyond the environmental issue, this observation is also the symptom of a law that no longer succeeds in imposing itself and whose primary purpose, that of founding a social contract, has been forgotten. The dishonest logorrhoea of standards undermines the credibility of the law, while human activity, fuelled by greed and the lure of short-term gain, continues ineluctably to eat away at biodiversity. Will peoples be able to reverse these trends ?

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