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Recognition and Constitutional Guarantee of the Right to the Environment in the Democratic Republic of the Congo

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Abstract

Since 2006, the Constitution of the Democratic Republic of Congo has included the right to a healthy environment on the menu of justiciable rights. This reform is undoubtedly of symbolic importance, in that it introduces the concept of a healthy environment into the highest hierarchical standard of domestic law. Despite this, the options and words used by the constituent are open to criticism. In particular, the choice of terms and the inclusion of the right to the environment within the category of economic and social rights enumerated in Article 53 do not appear to be entirely satisfactory because they reduce its content to the protection of human health, even if health is understood in its broadest sense, including well-being. The approach is therefore part of an anthropocentric trend which, after having marked the beginnings of environmental law, seems to be experiencing a new revival. This approach calls for a study of the formalisation of the right to a healthy environment, its constituent parts, its obligations, and its effectiveness.

Keywords

Healthy Environment, Environmental Justice, Human Rights, Access to Justice

1. Introduction

Following the two major UN conferences on the environment (Stockholm in 1972 and Rio in 1992) and the adoption of Law No. 11/009 of 09 July 2011 on the fundamental principles relating to environmental protection, on the recom-

mendation of Article 123 of the Constitution, environmental law has become an autonomous branch of law. The right to a healthy environment is thus enshrined in article 53 of the 2006 Constitution, as amended in 2011. The right to a healthy environment is not an easy right to define. It is a human right that is vital to the realisation of other rights, such as the right to health and the right to life. Procedurally, it includes access to information, public participation, and access to justice and effective remedies. Substantively, it includes clean air, a safe climate, safe water, adequate sanitation, safe and sustainably produced food, non-toxic environments in which people can live, work, study and play, and healthy biodiversity and ecosystems. Taken together, these elements constitute the definition of the right to a healthy environment. Constitutionalisation places it on the menu of justiciable human rights. The country's accession to international conventions enshrining the right to a healthy environment as a human right has also facilitated its constitutionalisation. It was the example of article 24 of the African Charter on Human and Peoples' Rights that inspired Congolese legislators to enshrine the right to a healthy environment. The introduction of the Environmental Protection Act has thus contributed, at least from a formal point of view to the assimilation of the principles, procedures, and advanced techniques of environmental protection. As a result, the process of enshrining and guaranteeing the right to the environment has followed a similar pattern to that in other countries around the world: gradual emergence at legislative level, reinforced by the ratification of certain international texts, and finally recognition at constitutional level. The right to a healthy environment is accompanied by several guarantees. These include formal guarantees (access to environmental information, public participation in the decision-making process, access to environmental justice); but also, a panoply of rights considered as substantial guarantees (right to life, right to drinking water, right to housing, right to leisure, etc.). The recognition and constitutional guarantee of the right to a healthy environment in the Democratic Republic of Congo raises the question of its effectiveness. This raises the question of whether the enshrinement in the constitution of the right to a healthy environment and the adoption of the law on fundamental principles relating to environmental protection can lead to the judicial recognition of a right to an environmental judge. The culmination of the effectiveness of the right to a healthy environment is above all its constitutionalisation (2), which would lead to the determination of its scope and/or nature (3). Already recognized as a human right, the right to a healthy environment should thus enjoy several guarantees arising from its enshrinement (4). The summation of all these elements thus calls for the intervention of the judge for its effectiveness (5).

2. Constitutional Formalisation of the Right to the Environment

For several years now, the right to the environment has continued to break records in the political arena, and more generally in the way it is considered. This began

with developed countries[1], before being taken into consideration by developing countries. The right to the environment made its first appearance at the United Nations Conference on the Human Environment in Stockholm in 1972[2]. Twenty years later, the right to the environment was once again clearly and unambiguously enshrined. This was with the Rio de Janeiro conference in 1992. These two major conferences awakened the conscience of humanity to the boundless dangers posed to the environment by human activity and natural disasters. This desire to recognize the right to the environment led to the introduction of national legislation incorporating it into their legal corpus.

In the Democratic Republic of Congo, the environment is directly covered by constitutional provisions that may give rise to positive obligations on the part of the public authorities, while leaving them a wide margin of discretion in implementing them (Bindu, 2022). These provisions range from recognizing the right of every citizen to a healthy environment (1) to imposing an obligation on the judiciary to prosecute any infringement of this right (2).

2.1. A Healthy Environment as a Fundamental Constitutional Right

As in the rest of the world, in the Democratic Republic of Congo there has been a turnaround in the enshrinement of the right to the environment: gradual emergence at legislative level, reinforced by the ratification of certain international texts. It was back in 2006 that the human right to a healthy environment was made constitutional. Article 53 of the 2006 Constitution, as amended in 2011, states that "*Everyone has the right to a healthy environment conducive to their full development. They have a duty to defend it. The State shall ensure the protection of the environment and the health of the population*"[3]. This provision has two important dimensions: a human dimension (human health and development), and a psychological dimension (if the human dimension is not respected, the individual may be exposed to problems. This gives rise to the possi-

[1]Belgium, for example, has had the right to an environment enshrined in its constitution since 31 January 1994. Article 23 of this constitution provides as follows: "*Everyone has the right to lead a life in keeping with human dignity. To this end, the law, decree or rule referred to in Article 134 shall guarantee economic, social and cultural rights, taking into account the corresponding obligations, and shall determine the conditions for their exercise. These rights include in particular: 1° the right to work and to the free choice of a professional activity within the framework of a general employment policy aimed, inter alia, at ensuring as stable and high a level of employment as possible, the right to fair working conditions and remuneration, as well as the right to information, consultation and collective bargaining; 2° the right to social security, health protection and social, medical and legal assistance; 3° the right to decent housing; 4° the right to protection of a healthy environment; 5° the right to cultural and social development; 6° entitlement to family benefits*".

[2]In its first principle, the Stockholm Declaration clearly recognised that man has a fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being. They have a solemn duty to protect and improve the environment for present and future generations.

[3]This provision takes up the provisions of article 24 of the African Charter. It adds that everyone has a duty to defend this right. Finally, it emphasises that the State shall ensure the protection of the environment and the health of the population. Unfortunately, its application seems problematic in the DRC, where the State, in its mission to protect citizens from all natural disasters, should train environmental judges and set up specialised environmental courts to ensure that this right is effective.

bility of legal action). The spirit and the letter of article 53 impose an obligation on the State: the obligation to guarantee every citizen a healthy and favorable environment. Similarly, citizens are assigned a duty: the duty to protect and improve the environment. This duty is a counterbalance to the specific guarantee of the right to a healthy environment. The enshrinement is of symbolic importance, in that it introduces the concept of a healthy environment into the highest hierarchical standard of domestic law, but it is open to criticism. In particular, the choice of terms and the inclusion of the right to the environment within the category of economic and social rights enumerated in Article 53 do not seem entirely satisfactory, because they reduce its content to the protection of human health, even though health is understood here in its broadest sense, including well-being (Neuray, 2001). The approach is therefore part of an anthropocentric trend which, after having marked the beginnings of environmental law, seems to be experiencing a new revival (Neuray, 2001).

As this was not enough, in accordance with Article 123 of the Constitution[4], Law 11/009 of 09 July 2011 on the fundamental principles of environmental protection was introduced. The aim was to prevent any damage to the environment. Article 46 of the law takes up the provisions of article 53 of the Constitution. According to this provision, "*Everyone has the right to a healthy environment conducive to their full development. They have a duty to defend it, by all legal means, in individual or collective action*". Article 47, paragraph 1er of the same law sets out one of the key elements of the right to a healthy environment, stating that "*Everyone has the right to breathe air that is not harmful to their health*". The inclusion of the environmental aspect in the fundamental law bears witness to the importance of environmental issues. The constitutional enshrinement of this right and the adoption of an environmental law are a formal means of assimilating the principles, procedures, and advanced techniques of environmental protection (Dutu, 2004). The legislative adoption of instruments guaranteeing the right to the environment now seems to be a key issue in the Democratic Republic of Congo.

2.2. A Healthy Environment, a Binding Human Right

The key question is whether the environment is related to human rights. John Knox emphasized the fundamental links between human rights and environmental protection: the realization of the former depends largely on the environment in which they are exercised; and conversely, environmental protection can only be implemented effectively and transparently if rights such as freedom of access to information or the right to judicial protection are guaranteed (Hennebel & Tigroudja, 2019, A/HRC/22/43, 2012). It is not surprising to argue that a healthy environment is a prerequisite for the existence of all life. Man can only live in an environment of a certain quality. In terms of content, the right to a healthy environment therefore focuses on the issue of human health (in the

[4]According to this provision, without prejudice to the other provisions of this Constitution, the law shall determine the fundamental principles concerning: […] environmental protection and tourism; […].

anthropocentric sense), and not on an intrinsic (or egocentric) quality of the environment (Taillon & Binette, 2020). However, in many cases, one cannot be achieved without the other (Taillon & Binette, 2020). For example, it is necessary to "protect not only the health and physical integrity of persons, but also the maintenance of the diversity and integrity of species, ecosystems and natural processes in order to promote the quality of life of human beings and the realization of all their fundamental rights and freedoms". To this end, the right to a healthy environment is defined as the total of standards "whose purpose is to protect a natural environment conducive to health and to guarantee the participation of citizens in decision-making processes that may compromise their environmental rights (Taillon & Binette, 2020). Compromising the quality of the environment could have corollaries with man's responsibility towards present and future generations. The affirmation of the binding nature of the environment as a human right is one of the manifestations of its anthropocentric conception (Paques, 2006). This concept places man at the center of environmental protection. The right to the environment thus finds its place in the menu of human rights. In this respect, it is a binding right, since there is no hierarchy among recognized human rights, since their nature is indivisible and interdependent (Mercure, 2002), but some are more fundamental than others. The constitutionalisation of the right to the environment places it among the binding rights. Olivier Lecuq reminds us at this point that law in general, and constitutional law in particular, is only of interest and ultimately fulfils its function when it produces normative effects, when it permits, constrains, demands, sanctions, or protects, and only when they are given the means to do so (Lecucq, 2020). This concept draws on the nature and scope of the human right to a healthy environment.

3. The Nature and Scope of the Human Right to the Environment

The human right to a healthy environment is enshrined in the Constitution. The 2006 Constitution of the Democratic Republic of Congo, as revised in 2011, contains a provision expressing the public authorities' desire to provide every citizen with an environment free from any health risk. This raises the question of whether the right to a healthy environment a collective or individual right is. The wording of article 24 of the African Charter on Human Rights, which refers to the right of the people, implies collective rather than individual recognition. But a combined reading of article 53[5] of the Constitution and article 46[6] of the Environmental Protection Act suggests that this is a right that can be exercised individually and/or collectively[7]. The wording enshrined in article 53 of the

[5]Everyone has the right to a healthy environment that is conducive to their full development. It is their duty to defend it. The State shall ensure the protection of the environment and the health of the population.

[6]This article reproduces article 53 of the Constitution.

[7]This time, there is the question of being able to quantify and/or to know what is the threshold of degradation that the citizen must take into consideration to take legal action. This question also seems problematic given that the texts that enshrine the right to the environment are all silent on the degree of seriousness or the threshold of pollution to be taken into consideration.

Constitution refers most closely to a right recognized as belonging to everyone. Anyone who feels oppressed can raise his or her justiciability before a judge. The letter of the law might suggest a contradiction, whereas the spirit of the two methods might suggest complementarity. A human right recognised for everyone without discrimination based on race, skin, language, religion, ethnicity, political opinion, or any other opinion, national or social origin, etc.[8] In addition to individual recognition, this right can also be exercised by the community through associations and/or NGOs[9]. Most often, civil society acts from time to time to defend the rights of civilians. If we consider the anthropocentric interpretation of the right to a healthy environment, we will conclude that the beneficiaries are indeed individual men and women who can invoke the defense of the environment to protect their living conditions (Magistro, 2017). But to safeguard this right, the beneficiaries would have to face up to a key contentious element, the interest to act. In order, to defend an individual environmental interest, that interest must be identifiable, and there must be a genuine interest in acting (Lecucq, 2020). This condition seems rather open to criticism, as it would run the risk of considerably closing *environmental litigation*, *since it will be agreed that the interest in protecting the environment is most often of a collective nature and that individualizing it is not an easy task. And in the absence of legal battles*, *it is the environment that will ultimately suffer* (Lecucq, 2020). States are obliged to settle the question in their legislation, and in the Democratic Republic of Congo the constitution has settled the question by imposing, as a condition, the existence of environmental damage.

One of the relevant elements of the constitutionalisation of the right to a healthy environment is that the burden of environmental protection is now placed on citizens. Similarly, the drafters of the Constitution also impose an obligation on the State not only to protect the environment, but also to ensure the survival of its citizens, considering the health of the population. This duty to protect the environment incumbent on the authorities under article 53 extends to all legislative, administrative, or judicial authorities which, in the exercise of their powers, take decisions likely to have a significant effect on the environment, for example in the areas of agriculture, town and country planning, urban development or transport, and not just to the authorities specifically responsible for protecting the environment (Born & Haumont, 2011). This could raise the problem of the effectiveness of this constitutionalisation.

4. Constitutional Guarantees and Effects of the Right to the Environment

As a constitutionally recognized fundamental right, the right to a healthy, satis-

[8]Read articles 2 of the African Charter and 13 of the Constitution of the Democratic Republic of Congo.

[9]A problem arises simply because there is no text setting out the conditions that NGOs must meet in order to do this. Are there specific NGOs for this purpose, or is any NGO entitled to take legal action on environmental issues? Certain conditions already have to be met for citizens. These include standing, capacity, but also interest in acting. These conditions also seem problematic and will be the subject of further study.

factory, and sustainable environment enjoys procedural guarantees corresponding to human rights (Kongo, 2020). As such, it is a human right subject to sanctions in the event of non-compliance.

As we have already said, according to the wording of article 53 of the Constitution, this right is recognized "to any person". Article 46 of the Environment Code does the same. These two provisions place an obligation on the State to guarantee citizens a healthy environment. As Mircea reminds us, the right to a healthy and ecologically balanced environment is a right of solidarity between present generations, on the one hand, and between present and future generations, on the other. The first type of solidarity is based on humanity's common interest in ensuring a healthy and ecologically balanced environment and expresses the interdependence between individuals of the same species and the natural environment. The second is expressed above all in the idea of the "rights of future generations" (Dutu, 2004). The right to a healthy environment takes shape, firstly, in the collective and individual duty of present generations to maintain and improve the quality of the environment over the long term so that it can be passed on to future generations. From a legal point of view, it is very important to enshrine, for this purpose, the obligation to consider the preservation of nature in the long term and in a viable form (Dutu, 2004).

4.1. Guarantees of the Right to a Healthy Environment

The fact that the right to a healthy environment has been enshrined in the constitution means that it is one of the rights that is guaranteed by fundamental rights and freedoms on the one hand, and by procedural guarantees on the other.

The first category gives rise to institutionalized guarantees such as: control of the constitutionality of laws (a priori and preventive, or subsequent and sanctioning, and above all the procedure of the exception of constitutionality), control exercised over administrative activities (which may be political, administrative control, in the form of conciliation, jurisdictional, or involving administrative responsibility) (Dutu, 2004). Like other economic, social and cultural rights, the right to a healthy environment obliges public authorities not only to develop environmental policies specifically designed to realize such a right, but also, and where appropriate of course, to integrate concerns relating to the quality of the environment into all other educational, town planning, economic and other policies (Renson & Verdussen, 2020). Central and local public authorities, as well as all natural and legal persons, are concerned by the respect of such a right, unless they incur liability. Article 60 of the Constitution states: "*Respect for human rights and fundamental freedoms enshrined in the Constitution is binding on the public authorities and on all* persons"[10]. The State is thus obliged to legislate

[10]Article 60 of the Constitution of the Democratic Republic of Congo, amended by Law No. 11/002 of 20 January 2011 revising certain articles of the Constitution of the Democratic Republic of Congo of 18 February 2006.

to give effect to the right to a healthy environment (Thériault & Robitaille, 2011). In this way, the State can be said to have subscribed to the obligation of non-regression imposed by the healthy environment. A further distinction should be drawn between non-regression resulting from an express prohibition on amending the environmental provision in the constitution, and non-regression resulting from the constitutional prohibition on the legislature diminishing the scope of a fundamental right. In both cases, non-regression is guaranteed subject to case law, that of the constitutional courts (Prieur, 2012).

To enable citizens to exercise their right to live in a healthy environment and to fulfil their duty to protect and improve the environment under Article 53 of the Constitution and Article 46 of the Environment Code, the Aarhus Convention, in conjunction with Law No 11/009 of 09 July 2011 on the fundamental principles relating to environmental protection, specifically guarantees a series of subsessile rights. This is a chain of rights leading to the effectiveness of the right to a healthy environment. These substantive rights are:

- The right to access environmental information in accordance with the conditions of confidentiality laid down by the legislation in force: This right is enshrined in Article 8[11] of Act No. 11/009 of 09 July 2011 on the fundamental principles relating to environmental protection[12];
- The right to be consulted with a view to taking decisions concerning the development of policies, laws and regulations relating to the environment, the management of natural resources and any development: provided for in Article 9 of Law no. 11/009 of 09 July 2011 on the fundamental principles relating to environmental protection[13];
- The right to apply to the administrative and judicial authorities to prevent the occurrence of direct or indirect harm, or to seek compensation in the event of harm: provided for in Article 19 of the Constitution[14] and in Article

[11]According to this provision, "*Everyone has the right of access to available, complete and accurate information relating to the environment, including that relating to hazardous substances and activities and the measures taken for their prevention, treatment and elimination, as the case may be. The State, the province and the decentralised territorial entity shall make available to the public any information relating to the state of the environment. The procedures for access to information and the means of appeal in the event of unjustified refusal to provide information are defined by decree deliberated in the Council of Ministers.*

[12]This law was also supplemented by Article 20 of Decree No. 14/019 of 02 August 2014 laying down the operating rules for the procedural mechanisms of environmental protection dealing with the procedure followed for an environmental impact assessment in that "… *The agency shall make available to the public, the Manual.*"

[13]According to this provision, "*Everyone has the right to participate in the decision-making process relating to the environment and the management of natural resources. The public shall participate in the process of preparation by public authorities of policies, programmes, plans and regulations relating to the environment within a transparent and fair framework defined and established by those authorities. The public concerned shall also have the right to participate, from the outset and throughout, in the process of taking decisions which affect its existence or may have a significant effect on the environment, in particular planning decisions, authorisations to commence a project or activity, authorisations to construct or operate classified installations, emissions, and environmental and social impact assessments. It has the right to be informed of the final decision*".

[14]"*No one may be removed or distracted against his will from the court assigned to him by law. Everyone is entitled to have his case heard within a reasonable time by a competent court*".

134 of Law no. 011/2002 of 29 August 2002 on the Forestry Code[15]. Also, by article 46 of Law no. 11/009 of 09 July 2011 on the fundamental principles relating to environmental protection[16].

The substantive guarantees of the right to a healthy environment also led to a panoply of rights guaranteed in substance. These include:

- The right to life is guaranteed by the Constitution: "*Everyone has the right to life, to physical integrity and to the free development of his or her personality with due respect for the law, public order, the rights of others and morality*"[17]. According to the spirit of this provision, the right to life and the right to the environment are closely linked, as the quality of the environment has a direct impact on human life. In accordance with this right, any activity that could have an impact on human life and health is prohibited. Examples include prevention, pollution, toxic waste, etc.
- The right to health: Respect for the right to a healthy environment is a prerequisite for enjoying the right to health. It is recognized in Article 47 of the Constitution[18] and Article 47 of the Environment Act[19];
- The right to water and sanitation: recognized as a human right, essential to the full enjoyment of life and the exercise of all human rights, (**A/RES/64/292**, 2010). It can be interpreted as a right of resistance. The right to life is a right that the State cannot derogate from, let alone restrict. This is set out in Article 61 of the Constitution[20];
- The right to live in a non-toxic environment representing the right to housing enshrined in article 48 of the constitution[21].
- The right to healthy food produced using sustainable methods: Guaranteeing the right to a healthy environment means guaranteeing the right to food. This right is guaranteed in an ambiguous way in the Constitution, which stipulates that "*The right to health and food security is guaranteed* […]"[22];
- The child's right to play is enshrined in the United Nations Convention on

[15]According to this provision, "*Associations representing local communities and approved national non-governmental organisations contributing to the implementation of government policy in environmental matters may exercise the rights granted to civil parties in respect of acts constituting an infringement of the provisions of this law and its implementing measures, or an infringement, according to the international agreements and conventions ratified by the Democratic Republic of Congo and causing direct or indirect damage to the collective interests that they aim to defend*".

[16]The provision enshrines the duty of every person to defend the protection of the environment, by all legal means, in individual or collective action.

[17]Article 16, Paragraph 2 of the Constitution as amended by Law no. 11/002 of 20 January 2011 revising certain articles of the Constitution of the Democratic Republic of Congo of 18 February 2006.

[18]According to this provision, "*the right to health and food safety is guaranteed*".

[19]This provision stipulates that to guarantee the right to health, "*Everyone has the right to breathe air that is not harmful to health*. To ensure the effectiveness of this provision, any activity that might compromise the enjoyment of the right to a healthy environment is prohibited.

[20]According to this provision, in no case, and even when a state of siege or a state of emergency has been proclaimed in accordance with Articles 85 and 86 of this Constitution, may there be any derogation from the fundamental rights and principles listed below: 1. the right to life […].

[21]According to this provision, "*The right to decent housing and the right of access to drinking water and electricity are guaranteed. The law shall determine the manner in which these rights are to be exercised*".

[22]Article 47 of the 2006 Constitution as amended in 2011.

the Rights of the Child[23]. Under article 2[24], signatory states are required to respect this right. Having ratified the Convention on 27 September 1990, the DRC reaffirms its adherence to and commitment to the Convention in the Preamble to its Constitution[25].

4.2. The Effects of the Right to a Healthy Environment Enshrined in Article 53 of the Constitution

A right is only important if it is capable of being binding and producing effects. By enshrining a norm, it should directly produce its effects (A), and serve as a margin or guideline (C). But in all this, the standard must be able to compel the state not to regress, and this is known as the standstill effect (B).

1) The direct effect

The question of the direct effect of a right arises in two situations. The first is where a right is enshrined in domestic law, and the second is where there is no provision expressly enshrining a right in domestic law. The right to a healthy environment is enshrined in the constitution of the Democratic Republic of Congo. Article 53 of the Constitution, which enshrines this right, must be applied by Congolese judges since they have a constitutional mandate to ensure compliance with domestic legislation. In this way, the right to a healthy environment should have direct effect at domestic level. A second hypothesis is that a right is not enshrined at domestic level but is enshrined at international level. An individual who is the victim of such a right would have to go to court to claim that the domestic legal system complies with international law. This does not mean that treaties take precedence over domestic law, but rather that international law sheds light on domestic law[26]. The right to a healthy environment should therefore directly produce its effects in view of its international consecration. In this regard, Céline divides the direct effect of a right into two realities: *a fundamental right may be used* "*either to claim a right of its own*" (*direct effect in the restricted sense*), "*or for the purpose of obtaining a review of the confor-*

[23]Adopted unanimously on 20 November 1989 by the General Assembly of the international organisation, such as the right to a family environment (art. 18 and 19), the right to health (art. 24) and the right to education (art. 28).

[24]According to this provision, "*All States Parties undertake to respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status*".

[25]Preamble of the Constitution of the Democratic Republic of Congo; amended by Law no. 11/002 of 20 January 2011 revising certain articles of the Constitution of the Democratic Republic of Congo of 18 February 2006.

[26]Articles 215 and 216 of the Constitution of the Democratic Republic of Congo lend imperium to what we are saying. According to Article 215, "International treaties and agreements duly concluded shall, upon their publication, have an authority superior to that of laws, subject, for each treaty or agreement, to its application by the other party."Article 216: "If the Constitutional Court is consulted by the President of the Republic, the Prime Minister, the President of the National Assembly or the President of the Senate, or by one tenth of the deputies or one tenth of the senators, and declares that a treaty or international agreement contains a clause contrary to the Constitution, ratification or approval may only take place after the Constitution has been revised". These two provisions clearly explain the influence that international law has on domestic law in the DRC and give priority to international treaties and agreements over laws.

mity of State measures of domestic law with [international or constitutional] law" (*direct effect in the broad sense*) (Romainville, 2013).

2) The standstill effect

According to Isabelle Hachez, the standstill obligation, the ratchet effect, or the theory of non-return prohibits public authorities from legislating against guaranteed rights, and therefore from reducing the level of protection acquired (Hachez, 2000). Derived a contrario from the progressive nature of the positive obligations expressly enshrined or implicitly contained in fundamental rights, the standstill principle prohibits the State, in the absence of compelling reasons, from reducing the highest level of protection conferred on these rights since the moment when the international or constitutional norm enshrining them became binding on it, or from significantly reducing it when the State makes use of the margin of maneuver conferred on it by this principle by choosing to guarantee the said level of protection differently (Hachez, 2009). It is in this way that the right to a healthy environment finds its reason to weigh on the Congolese judge. In the absence of a standard enshrined at domestic level, the standstill effect is imposed on the judge by the application of international law. In the Democratic Republic of Congo, the problem should not arise because the right to a healthy environment is a constitutional right. The judge is faced with two standards, a constitutional standard, and an international standard. He will therefore be able to choose the better standard. This has been amply demonstrated by Isabelle, who argues that this obligation can be deduced from the positive obligation to progressively realize or protect the fundamental rights guaranteed by treaties or the constitution. The rationale behind this standstill obligation is that, apart from prohibiting any form of regression in the realization of the right to a healthy environment (Romainville, 2013), it thus acts as a palliative to the absence of direct effect.

3) Orientation effect

As VERDUSSEN points out, the "guiding" effect of the right to a healthy environment is its ability to constitute a principle of interpretation (Verdussen, 2007), an ability confirmed by the principle of the interpretation of laws in conformity with the Constitution by the courts and the administration (Romainville, 2013). This ability to interpret should therefore be the panacea of the Congolese judge since the Congolese legislator has recognized this right. Normally, the judge should focus on the application of domestically enacted and ratified texts, but the Congolese reality proves that it is impossible to refer the right to an environment to the judge. It is true that the judge cannot take matters into his own hands, but penetrating the meaning of the right to a healthy environment is a matter of public policy. This would lead the public prosecutor to refer a case to the courts in the event of a violation of the right to a healthy environment. If things were like that, the judge's inactivity in this area should not be felt.

5. Jurisdictional Enforcement of Environmental Rights

Articles 9(2) of the Aarhus Convention, 19 of the Constitution, 34 of Law no.

011/2002 of 29 August 2002 on the Forestry Code, and 46 of Law no. 11/009 of 09 July 2011 on the fundamental principles relating to environmental protection guarantee litigants the right of access to the courts in all environmental matters. It can thus be said that the right to a healthy and favorable environment guaranteed in Article 53 of the Constitution should usefully find its extension in a right of access to justice for litigants. Congolese legislation gives citizens the possibility of accessing the courts individually, as well as collectively through associations and NGOs campaigning for environmental protection. Despite this recognition, there is a gap in case law, leading to the non-existence of environmental litigation in the DRC, at a time when environmental crime is on the increase. This regression suggests that the inclusion of the right to a healthy environment on the menu of justiciable rights is a farce. However, according to a report by the Sabin Center on climate change litigation, environmental litigation in other countries has increased since 2017, rising from 884 cases in 2017 to 2180 cases in 2022 (Sabin Center, 2023).

It cannot be said that environmental standards are truly enshrined in the DRC when they lack concrete sanctions. For an environmental standard to be effective, it must be accompanied by sanctions. This, at least, suggests the finalistic nature of environmental law. Legal literature often equates the concepts of effectiveness and sanctions, thus expressing the idea that a standard is effective when it is sanctioned or punished (Bétaille, 2014).

Environmental penalties can be divided into three procedures. Firstly, administrative sanctions involving administrative liability. In environmental matters, administrative liability may be incurred either because of polluting activities originating from a public service or public works, or because of the failure of the police services to monitor and control polluting activities (Prieur, 2011). Administrative repression must therefore essentially take the form of administrative sanctions adopted by the administrative authorities against private individuals (Bétaille, 2014). This is when Congolese law obliges, for example, the State, the province, and the decentralized territorial entity to take appropriate measures to prevent environmental degradation. To this end, they adopt integrated strategies for the conservation and sustainable management of land resources, including soils, vegetation, and related hydrological processes[27]. The State, the Province and the decentralized territorial entity shall, within the limits of their respective competences, take the necessary measures to ensure a healthy environment for every citizen. They shall also take appropriate measures to adapt to climate change[28].

On the other hand, there is criminal law enforcement based on environmental criminal liability. Its purpose is to punish non-compliance with various environmental standards. It thus guarantees a healthy environment by targeting *public awareness of environmental risks* (Favre, 2022). Environmental crime is a

[27]Article 28 of Law N° 11/009 of 9 July 2011 on the fundamental principles of environmental protection.

[28]Article 48 of Law N° 11/009 of 9 July 2011 on the fundamental principles of environmental protection.

criminal offence under Congolese law. Anyone who damages the environment or any part of it incurs criminal liability. This is provided for in the Congolese legal arsenal, which includes criminal offences and penalties in the environmental sector. For example, Chapter 8 of the Law of 9 July 2011 on the fundamental principles of environmental protection and Title IX of the 2002 Forestry Code[29]. These texts also provide for financial penalties, penal servitude, and special measures such as site restoration. They are under the control of the courts.

The last procedure is environmental civil liability. It is understood as an obligation to repair and sometimes prevent and/or stop damage caused to others, but also to the environment. It marks an extension both of the types of damage that can be repaired, i.e. damage caused to people and the environment, and of the purposes of civil liability, i.e. liability for the past and for the future (remedial and preventive purposes) (Hautereau-Boutonnet, 2018). The Congolese legislator has provided for this in Chapter 7 of the Law of 9 July 2011 on the fundamental principles relating to environmental protection[30]. Although Congolese environmental legislation provides for environmental liability, it does not define the mechanisms for remedying environmental damage. The judge is left to pioneer an assessment system which, unfortunately, may not reflect the reality of the damage suffered (Bindu, 2022). It is therefore possible to have recourse to civil liability law, in particular the provisions of Book III of the Civil Code (articles 258, 259 and 260).

Finally, it is important to emphasize that making penalties effective also means strengthening the powers of judges to suspend and withdraw authorizations. The primary objective of environmental legislation is to combat pollution. In this context, it has become necessary to give the judge the power to suspend or withdraw building permits for developments that are likely to cause pollution. In the absence of such provisional measures, it would be impossible to prevent such pollution before the court has given a final ruling on the legality of the authorizations (Delile, 2016).

6. Conclusion

The constitutionalisation of the right to a healthy and favorable environment is a means of achieving a gradual shift in conceptual terms, and in the rules and practices of the courts and the administration. Following the Democratic Republic of Congo's compliance with the provisions of two major UN conferences on environmental protection, a constitutional basis was put in place recognizing every citizen's right to live in a healthy environment. On the recommendation of the Constitution, a legal framework was also put in place to protect the environment. This led to the adoption of the 2011 law on fundamental principles relating to environmental protection. The enshrinement of such a standard is thus seen as a burden that can weigh not only on the public authorities to protect the environment, but also on the judge to verify compliance with the said standard.

[29]This title is packed with criminal provisions in the forestry sector.
[30]This chapter is entitled Civil Liability.

This process has made environmental law autonomous in the Democratic Republic of Congo. Henceforth, the right to a healthy environment is included in the menu of rights subject to justiciability. Justiciability thus gives victimized citizens the ability to take legal action to protect their right to a healthy environment. This ability is recognized for everyone, who should now be able to do so individually or collectively. This right has already been recognized in the Democratic Republic of Congo for 17 years, but it is still less justiciable. There is still an exaggerated level of environmental crime, which curiously goes unpunished. This is justified by the virtual non-existence of environmental litigation. Congolese judges have a constitutional mandate to ensure compliance with national legislation. In other parts of the world, according to a report by the Sabin Center on climate change litigation, environmental litigation has increased. One of the reasons for this increase has been the seriousness with which the right to a healthy environment has been elevated to the level of justiciable human rights. This recognition has given the vulnerable the opportunity to take legal action against their States, and public and private companies operating in areas relating to the environment. Regrettably, the Democratic Republic of Congo is not on the list of countries that have moved in this direction. This calls for the adoption of an effective environmental policy. Finally, it is important to remember that the adoption of a standard must be accompanied by sanctions. It is therefore necessary to strengthen the powers of the judge by giving him the ability to suspend, revise and withdraw any authorization that has an impact on the environment and may contribute to its deterioration. Such a power would enable the judge to rule on the legality of authorizations and operating permits. As far as citizens are concerned, they should benefit from all the guarantees offered by the Constitution. The right to a healthy environment is thus unequivocally enshrined.

Conflicts of Interest

The authors declare no conflicts of interest regarding the publication of this paper.

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