

Substantive Environmental Rights in the EU: Doomed to Disappoint

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Introduction (1)

1) Do I have a right to clean drinking water in EU law?

2) Do I have a right to be free from significant pollution under EU law?

- Both substantive rights.
- With (1) has this kind of rights framing been particularly visible? With (2) is this right ever likely to be practically enforced?

Introduction (2)

- Rise of procedural EU environmental rights post Aarhus
- Substantive cousins exist in theory, but have remained very much in the shadows as far as use by the environmental movement is concerned
- The current paper explores this puzzle
- It explores the current status of substantive EU environmental rights
- It seeks to explain why it is that a potentially salient group of rights has failed to fulfil its promise
- In the case of **legislative** substantive rights, I argue that the lack of a juridical need for a right within direct effect is a key factor
- With **fundamental** substantive rights, it is a feature of both redundancy and restrictive precedent.

Legislative Rights

- Rights within legislation (express or correlative of a duty/obligation)
- Substantive – right to a particular level of substantive environmental quality – e.g. Bathing Water Directive, Air Quality Directives
- Procedural – right to a procedure – e.g. EIA Directive, Access to Environmental Information Directive

Fundamental Rights

- From ECHR and its 'derived' environmental rights
 - Substantive – e.g. Art 8 right to family and private life
 - Procedural – e.g. Art 6 right to a fair trial
- From 'in-house' equivalent, as part of the general principles of law (i.e. framed as this)
- From EU Charter of Fundamental Rights
 - Explicit environmental 'right' = principle (Art 37)
 - Derived rights, modelled on ECHR
 - Procedural - e.g. Art. 47 right to an effective remedy
 - Substantive - e.g. Art. 7 right to private and family life; Art. 17 right to property

Legislative Rights - Incorrect Transposition

- Member States failing to transpose Directives into national law in a form which provides sufficient legal certainty to enable individuals to enforce them in national courts
- Court ruled, of many substantive environmental directives, that they were designed to protect public health and thus involved individual rights.
- E.g. Surface Water for Drinking Directives 75/440/EEC and 79/869/EEC; Lead in Air Directive 82/884/EEC

Direct Effect (1)

- 1990s - significant debate as to whether rights were a condition of direct effect or a consequence of it.
- Borrowing from the incorrect transposition case law, some suggested that rights were a prior condition for direct effect and that such rights were limited to directives which were aimed at protecting human health.

Direct Effect (2)

- But just because Court had said that certain types of environmental directive confer rights for the purposes of incorrect transposition, does not mean that rights are a condition for direct effect and that direct effect is limited to, e.g., environmental directives aimed at protecting human health.
- To make such a leap is (Prechal and Hancher) to engage in a form of 'conceptual pollution'.

Direct Effect (3)

- The fact that rights turned out not to be a condition for direct effect is a double-edged sword.
- Advantage that the scope of direct effect for environmental directives has not been limited by being restricted to a class of directives which confer rights on individuals.
- But, it means that the currency of rights framing –so powerful in other contexts such as civil and LGBT rights – has not had the opportunity to take hold in relation to substantive enviro. directives.

Direct Effect (4)

- 1994 UK Friends of the Earth (FoE) drinking water directive judicial review
- Cf. recent ClientEarth air quality case

State Liability

- Enjoyment of an individual right is an explicit condition of state liability under *Francovich/Brasserie du Pecheur*.
- Very few cases: Case C-420/11 *Leth*; (UK national court) *Bowden v South West Water* [1998] Env LR 445

Fundamental Rights

- There are examples of cases involving substantive fundamental environmental rights.
- E.g. Case C-416/10 *Križan* - a landfill site operator failed to show that the annulment of a permit by a national court on grounds of infringement of the IPPC Directive 96/61 was in itself an unlawful interference with its right to property in Art. 17 of the Charter.

Fundamental Rights (2)

- The majority of these substantive fundamental environmental cases have, like *Križan*, been anti-environmental cases brought by industry and involve property rights.
- Also the occasional pro-environmental **procedural** fundamental rights claim – e.g. Case C-260/11 R (*Edwards*) v *Environment Agency* (costs rules and the right to an effective remedy in art. 47 of the Charter).
- But there have been no pro-environmental **substantive** fundamental rights claims brought by the individuals or environmental groups. Why?

Fundamental Rights (3)

- Redundancy - i.e. no need to rely on EU fundamental rights – other avenues available.
- Restrictive Precedent – i.e. usable precedent is not available on which the environmental movement might base cases.

Conclusion

- High visibility of EU **procedural** environmental rights.
- Relative invisibility of EU **substantive** environmental rights.
- Paper has sought to explain the (given their salience) puzzle of the latter.