Precautionary Principle in the Environment Law

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Abstract: *The basic idea is that no one can foresee the future or the new risks generated by the unpredictable development of science and technology, so there must be a remedy for the law to sanction those who do not adopt a close behavior to this new existential situations. In this context, the precautionary principle has emerged, which entail a new social and individual attitude towards the threats and risks of modern technologies. The precaution requires the adoption of measures meant to protect human health and the environment, even if the current level of technical and scientific development does not anticipate a hazard but does not exclude it either.*

Keywords: *precaution, environment, protection, danger, development*

1. Introduction

Although it's a new legal concept in the field of the environment, the so-called Precautionary Principle is required and has become a legal, sustained and criticized reality in recent times, in the context of the social, economic and technological transformations we are constantly going through.

The necessity of approaching this principle comes from the fact that no one can foresee the future or the new risks generated by the irrepressible development of science and technology, so there must be a remedy for the law to sanction those who do not adopt an adequate behavior towards this new existing situations. In this context, the Precautionary Principle has emerged, implying a new social and individual attitude towards the threats and risks of modern technologies.

The Precautionary Principle has emerged together with two other principles, namely the ***Polluter Pays Principle*** the ***Principle of Prevention***.

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The first of these principles, namely the Polluter Pays Principle, is integrated into the classical civil liability: i.e. one author acting more or less reckless and his action causes a damage and he needs to pay because between the action of the author and the prejudice exists a causal relationship.

The Principle of Prevention is on a higher level as it provides for an obligation to intervene before the damage occurs. But the damage is certain and the causal relationship between the action to be prevented or the omission and the passivity that have to end is obvious.

The third case, the one of our principle, is much more complex, as it is a principle based on anticipation; the damage has not occurred yet and the eventuality of the prejudice was not undeniably demonstrated or demonstrable. The risk is uncertain and it is only possible, eventually plausible. This is about an anticipatory preventive action taken in the context of uncertainty about a risk difficult to define, but which has however a positive application in the field of positive law. Precisely these particular features of the precautionary principle linked to the uncertainty of risk generation have given rise to many criticisms regarding the need to regulate and apply the precaution in the field of environmental law.

Therefore, we believed that it is useful to analyze in this article the structure of the precautionary principle in the environmental law and the main criticisms in relation to its application in order to find a satisfactory solution, because the ***Precaution*** requires the adoption of measures for the protection of human health and the environment, even if the current level of technical and scientific development does not predict a hazard, but nor does it exclude it.

2. Structure of the Precautionary Principle in Environment Law

Thus, in order to be able to speak about a structure of the precautionary concept specific to the environment law, it is necessary to identify above all the fulfillment of three conditions:

- ***condition of danger***, more specifically, the potential characteristics of the effect of an activity;
- ***condition of knowledge***, which sets the level of knowledge with regard to the causal relationship between activity and effect, and
- specification of ***remedy***.

With regard to the ***condition of danger***, we are talking about the extent to which the danger should be in order to justify the assumption of a precautionary position and the implementation of a remedy. Is any danger enough to trigger precautionary actions or a minimum threshold is needed to be achieved? As there are some more significant kinds of hazards than others, have we to differentiate between the policies applied, judging not only by the intensity of the danger but also according to its nature?

If we were to answer the first question in the affirmative, we should accept that any activity suspected of danger should be forbidden. This assumption of the principle would be obviously exaggerated, and its immediate consequences being the prevention of scientific development as well as any activity that could involve a minimal risk of adverse environmental damage.

The second essential condition for presenting the structure of the precautionary principle is the ***condition of knowledge***. Because the precautionary principle refers to the need to regulate the activities that can cause environmental damages when the causal link between the factors considered potentially harmful and the environmental impact is not clearly established, the level of knowledge of the causal link is essential to define the principle.

Based on the common position of supporters of the precautionary principle, namely that under imperfect information conditions, it is preferable to regulate the activities that may have adverse consequences on the environment, we can consider that the specific level of knowledge is essential to establish the optimal remedy.

The remedy is the action taken to regulate an activity considered potentially harmful by the competent authorities. This action can be represented by both the prohibition of such activity and other measures, depending on the nature of the danger and the level of knowledge.

Since the interpretations of the principle differ on a case-by-case basis, the adoption or rejection of the precautionary principle requires the consultation between the parties concerned in order, first of all, to establish the method of application of the precautionary principle to the specific situation and thus to keep an open communication in the field of the environment between government, economic operators and society.

3. Criticisms of the Precautionary Principle

Because the precautionary principle has a leading role in developing the environmental policies at international and local level, a significant debate area in the literature was devoted to this principle, against which a number of criticisms have been expressed. In the following, I shall present the most relevant ones.

The precautionary principle was often criticized for its general *ambiguity*, for the ambiguity of particular concepts and, more specifically, for the ambiguity of the notion of uncertainty due to the impossibility of the scientific community to provide a comprehensive and acceptable definition for the concept of the precautionary principle. In the first case, the opponents of the principle attacked the differences of perception and interpretation existing even among its supporters, arguing that it is impossible to implement it as an executive principle since there is no consensus on the substance of the principle or, more precisely, the establishment of an environmental policy as a result of a function comprising the threat and knowledge variables.

Although criticism is founded, it can be factually observed that it is not sustainable under the circumstances in which the legislative acts in international law provide operational interpretations (although not always precise) of the principle (for example, the 1992 Rio Declaration or the Consensual Declaration of Wingspread on the Precautionary Principle). Moreover, the followers of this principle do not claim the existence of a single interpretation, depending on the context or the constituent conditions.

A second important critics against the precautionary principle is *the extremism*. This objection concerns both the radicalism of the conditions of danger or knowledge and the radicalism of the proposed remedy. Concerning the condition of danger, the critics of the principle argues that, in some cases, the principle can be used in spite of the minimal impact of an activity on the environment. In this respect, they give an example in which the authorities have ordered the removal of asbestos from the materials used for the construction of certain buildings, including schools, despite the fact that the level of exposure of the individuals inside the buildings was equivalent to the exposure to outdoor, thus insignificant, but producing instead unjustified adverse consequences through their intervention.

The same criticism is also brought regarding to the condition of knowledge, an argument in this sense being the fact that adoption of such precautionary measures is not justified in the case of a very low probability of a detrimental activity. From the same perspective, the reversal of roles in

demonstrating the causal link was also criticized, stating that it is impossible to establish in certain instances a clear relationship in this respect.

Last but not least, the criticism of a too strong remedy is particularly high in order to counter the prohibition of certain activities associated with potential negative environmental consequences, considering that technological and economic progress can be prevented by using too restrictive policies.

Another critique discussed in this paper argues that an approach to environmental policies that integrates the precautionary principle is inferior to a cost-benefit approach based on the premises that actions should be judged solely in terms of consequences, and the consequences are measurable in terms of efficiency.

Last but not least, we have to mention the criticism from the perspective of t*he risks of adopting remedies*. This critique represents an attack on the followers of the precautionary principle from the perspective of ignoring the negative consequences of the implementation of such regulatory actions.

In Katz's wording, "many environmental risk measures create more damage than the dangers they intend to avoid", exemplifying a hypothetical situation in which the nuclear power plants would be banned because of the risk of being involved in an accident with potential serious consequences, and the production of energy would be transferred to fossil fuel power plants, twice as polluting as the nuclear power plants under normal conditions.

Another example is given by Cross, exemplifying his position by the danger of removing lead from the lead paint, a process in which much larger quantities can be emitted into the atmosphere than under the original conditions.

Criticism is justified in some cases, but the adherence to a proportionality criterion as well as the performance of a comprehensive analysis prior to the implementation of the precautionary principle can prevent such effects, the problem being related to the applicability rather than to the normative structure of the principle.

In the end, a final critique discussed in this paper relates to the *stimulation of commercial protectionism*. The criticism of commercial protectionism caused by the application of a precautionary principle is targeting the potential negative consequences of the principle caused by its use as a political or economic instrument. On the other hand, the protectionist

decisions are purely political decisions and, in some cases, the level of "significant risk" may be manipulated by the political agents who have an interest in doing so.

An example of this is the European Union's ban on imports of beef from the United States based on the suspicions that they were fed with a certain type of hormone. While the precautionary principle can be really exploited for political purposes in a way that favors one party, this criticism can be applied equally to the cost-benefit analysis, facilities granted to the political position being both insignificant in a legislative context and insufficient differentiated from other types of decision-making principles.

4. Instead of Conclusions - Values of the Precautionary Principle

The construction of a principle applicable to public politics needs both to satisfy a set of formal desirable properties and to describe the substantial moral content. With regard to the set of formal properties of such a principle, we can suggest, as an illustrative role, the criteria of universality and generality.

The universal applicability refers to the capacity of the principle of providing a decisive response to all cases that might hypothetically fall within its scope. The specification of an universal precautionary principle by way of example must applies irrespective of the condition of danger or the condition of knowledge, not in the sense that it must prescribe the same remedy universally, but in the sense that it must prescribe a remedy.

The criterion of generality refers to the undifferentiated treatment of cases falling under the principle. This criterion has two implications. First of all, let's assume that an activity has potentially dangerous consequences from the point of view of destroying biodiversity in a particular region. A general principle would require the principle to be applied in the same way both in this case and in the same cases of similar destruction of biodiversity in another region or time period. Secondly, a general principle requires the application of an identical procedure even if the prescribed remedy is not necessarily the same in both cases and if the problem in the second case is not related to the destruction of biodiversity, for example, water pollution.

The classic way requires that all the formulations regarding the instantiated values of the precautionary principle need an impersonal value, according to which the protection of the environment is undoubtedly desirable. A second value, ignored (or even disputed) to a large extent in the literature on the precautionary principle, is targeting the value of efficiency.

In this context, we can consider that the value of efficiency refers to the evaluation of a result in terms of the impact of an action on the level of benefits held by the parties affected by this action.

Thus, according to the criterion of efficiency used, an outcome shall be considered positive or negative depending on the increase or decrease in the level of individual or collective benefits of the elements involved in the evaluation. The efficiency criteria shall be applied to the agents on a standard basis. In this particular case, the agents involved in the interaction (normally the individuals) are replaced by the sizes over which a public policy may have an impact (environment, economy, health, culture, education, etc.).

5. References

Katz, D. (2001). The Mismatch Between the Biosafety Protocol and the Precautionary Principle, *Georgetown International Environmental Law Review*, vol. 13, nr. 4

Manson, N. (2002). Formulating the Precautionary Principle, *Environmental Ethics*, vol. 24, nr. 3

Gardiner, S. (2006). A Core Precautionary Principle. *Journal of Political Philosophy*, vol.14, nr. 1

Cross, F.B. (1996). Paradoxical Perils of the Precautionary Principle, *Washington and Lee Law Review*, vol. 53, nr. 3

Volacu, Al. (2016). A hypothetical reconstruction of the precautionary principle in the environmental policies, *Transylvanian Journal of Administrative Sciences* 1 (38)