

A Tribunal for the Planet

by Pierre Auriel

Right to a healthy environment, rights of nature or of non-human animals: can environmental rights serve the cause of environmentalism? Legal expert Diane Roman analyses the pathways towards the jurisdictional enforcement of these new rights, and highlights the progress they have made, as well as their limitations.

Reviewed: Diane Roman, *La cause des droits. Écologie, progrès social et droits humains*, Dalloz, 2022, 298 p., 22 €.

Because they have become a major vector in struggles for social justice, social rights are subject to intense scientific and political discussion in the legal world. In *La cause des droits (The Cause of Rights)*, Diane Roman continues her analysis of these debates, which began with her thesis on poverty and the law, widening it out to include environmental rights. From the right to a stable environment to the rights of animals and nature, claims relating to environmental justice often imply the recognition and defence of new rights. Born out of social and environmental emergencies, social and environmental rights thus constitute one of the “mutations of the rule of law” (p. 22) and of fundamental rights which should, according to the author, be subjected to public debate.

This use of rights “at the service of a cause, that of social progress and environmentalism” (p. 37) is by no means self-evident. Balancing on a “razor-edge” (p. 36), avoiding both activism and soulless description, Diane Roman describes this development without trying to conceal its weaknesses or contradictions. The recognition of social and environmental rights can, it is true, no longer really be challenged. However, the mechanisms to guarantee their protection are still being

established, and the concrete details of their implementation will determine their effect on social and environmental injustices.

The Unity of Rights

The reticence to acknowledge social and environmental rights is based on a distinction between these new rights and civil and political rights such as the right to property, freedom of expression, or the prohibition of inhuman or degrading treatments. In this view, social and environmental rights are perceived as conditional rights whose enforcement would necessarily imply a positive intervention from the state, whereas civil and political rights are viewed as negative rights requiring only an absence of intervention on behalf of public authorities (p. 46). According to this reading, social and environmental rights imply budgetary and long-term choices which can only fall under the competence of a democratically elected Parliament. Entrusting such choices to a judge would, in this view, be equivalent to extending their competence beyond the field of the law and bringing it into that of politics (p.48-49), thus transforming them into a “supra-legislator” (p. 46) with no democratic legitimacy.

Diane Roman shows how this distinction was overturned from the 1970s. Several lines of argumentation were used. First of all, human rights are interdependent (p. 69). Guaranteeing civil and political rights without protecting social and environmental rights is a vain endeavour. Civil and political rights “have [extensions of an economic and social order](#)” and violations of social and environmental rights are also violations of civil and political rights. Typically, the situation of extreme destitution in which some asylum seekers or refugees find themselves due to the lack of social assistance is at once a violation of their social rights and an inhuman and degrading treatment (p. 71-72).

Secondly, human rights – whether civil and political or social and environmental – are founded on an identical structure. They always imply an obligation to respect (abstaining from “directly causing harm to the rights of individuals”), to protect (preventing third parties from causing harm to the rights of individuals “through the issuing of a protective legislation and the instauration of adequate modes of legal recourse”) and to intervene (“in order to render human rights effective, through the creation of public services and benefits”) (p.75-78). Thus, social and environmental rights do not only create positive obligations, they also have a

negative dimension: the state must refrain from causing harm to the environment of individuals, for example. Conversely, civil and political rights also imply positive obligations for the state: the protection of freedom of expression implies [regulating the concentration of media enterprises](#) or [controlling the activities of social networks in order to prevent them from silencing dissenting voices](#). The structural similarity between civil and political rights and social and environmental rights makes it impossible to distinguish them in terms of their nature or of a hypothetical separation between the realm of the political and that of the law. Social and environmental rights are fully-fledged rights which must be covered by the same regime as civil and political rights. Consequently, a judge may be appealed to in order to force public authorities to respect them, or to obtain reparations for their violation.

Birth of Rights

This affirmation of the unity of human rights does not of course resolve all difficulties. The richness of *La cause des droits* lies in the arguments that this legal expert develops in relation to the jurisdictional enforcement of environmental and social rights. Let us take, for example, the question of who holds social and environmental rights. Of these rights, many are recognised as belonging to groups, to future generations, or even to humanity as a whole (p. 122). Thus, the Ogiek people, who live in the Mau Forest at the heart of the Great Rift Valley, appealed before the African Court on Human and People's Rights against the expulsion of its members that had been ordered by Kenyan authorities. The argumentation put forward by its representatives relied on the right of peoples to freely dispose of their riches and natural resources. According to them, this right includes the right to preserve the traditional way of life of the Ogiek in the Mau Forest. By removing them and cutting down this forest, the Kenyan authorities would destroy their community (p.106-107). The Court ruled in their favour, recognising the existence of this collective right, while highlighting the threat "to the sovereignty and territorial integrity of the state" (p.108) implied by recognising such rights. To this risk is added that of a submission of the rights of individuals to those of the group, a submission which supposedly breaks with the liberal tradition of human rights. The author does not shy away from these difficulties, and shows the multiple effects of the legal advent of these new rights.

Diane Roman displays the same level of honesty when she examines the recognition of the rights of animals or nature (p. 132). For example, India recognised

that the Ganges and some parts of the Himalayas enjoy fundamental rights, while Colombia protects the rights of the Amazonian Forest (p. 140). But here too, this raises difficulties. Thus, to enable the defence of the rights of a forest, a lake or a glacier, one of the solutions involves appointing the native populations living there “as guardians of the nature and ecosystem in which their activities, traditions and ancestral beliefs are integrated” (p. 147). Just like a parent can defend the rights of their child, these populations can then assert the rights connected to these places before various jurisdictions. But this “duty of stewardship” (*ibid.*) can also turn into a trap for these communities, since as stewards they can be accused of failings and violations of the integrity of these places.

Sharing Responsibilities

There is another difficulty which must be resolved: determining responsibilities in case of violation of social and environmental rights. A large part of violations of social and environmental rights is caused by the choices of transnational corporations whose activities are not subject to the jurisdiction of one single nation-state. As a result, for part of the doctrine, these corporations must be held responsible for human rights violations before international courts.

However, Diane Roman reveals the limitations of this position. Indeed, two options can be considered. First, the corporations could be assimilated to nation-states, since some of them have a political and economic weight similar to that of some countries. As such, just like with a nation-state, the corporation could be held liable before an international jurisdiction such as the European Court of Human Rights. However, this perspective risks weakening “the political and democratic legitimacy of the latter. If shareholders are granted the same legitimacy as citizens, distinctions are blurred and corporations could demand more: [...] the rights of nation-states, starting with sovereignty” (p. 174).

A second option would be to assimilate these corporations to individuals. Just like individuals suspected of having committed serious crimes are judged by international criminal courts, corporations could be taken to court for behaviours that can be qualified as crimes against humanity. For example, in order to exploit Nigeria’s oil, Shell has polluted the traditional lands of native populations, or even voluntarily decimated these populations (p.7-8). As such, it would not be illogical to summon such

a corporation to the International Criminal Court in order for its crimes to be judged. However, this could only be an exceptional course of action, and “would not allow us to sanction commonplace violations to social and environmental rights” (p. 174-175).

Since creating a *sui generis* regime does not seem like a convincing option, Diane Roman seems to prefer another possibility, that of making nation-states bear the responsibility for violations of social and environmental rights committed within their jurisdiction by corporations. Those nation-states that do not effectively combat the unjust behaviour of corporations, including transnational ones, should be condemned by the international courts. This solution is the only one to have been put into practice by the European Court of Human Rights or by the Committee on Economic, Social and Cultural Rights, the UN organ responsible for implementing the International Covenant on Economic, Social and Cultural Rights (p. 178-180). But holding nation-states responsible for the activities of corporations does not resolve all difficulties. Certain key questions must still be decided upon, such as the sharing of responsibility between states when these activities have taken place on several territories, or the creation of norms of reference that are common to all states.

A Blunt Weapon

This book, which can be read as a defence of the weapon of rights in social and environmental struggles, also has the honesty to show the limitations of such a weapon. Pleas before the courts to defend social and environmental rights are not always effective, as is illustrated by the *Urganda* case. In 2015, a collective seized the Dutch courts “for culpable failure on the part of the state, accusing the government of not acting enough against climate change” (p. 222). In 2019, the Dutch Council of State condemned the state in a particularly rich and important ruling, without this “symbolic victory” (p. 259) [leading to any change in the government's environmental policy](#).

There are many reasons for this weakness. Some are connected to the very use of law as a mode of political action. Judges are often not equipped to make rulings on the systemic failings of public authorities and bring about a fundamental change to public policies (p. 227 and ff.) Since the unachieved victory of the civil rights movement in the United States, it seems clear that invoking rights can only serve to compensate for the worst injustices, without bringing about a real transformation of

society (p.275). Other difficulties are peculiar to social and environmental rights. In particular, these are frequently brushed aside to the benefit of the right of property and entrepreneurial freedom. At this point in the argument, we might regret that the author did not place more emphasis on the differences that remain between social and environmental rights. For example, in French law, social jurisdictions have frequently limited entrepreneurial freedom in order to protect social rights. It is because of this jurisprudential approach that, in 2013, lawmakers took away part of the competences of legal jurisdictions in social matters in order to hand them over to the administration, which was viewed as less meticulous in protecting social rights. But this tradition has no equivalent in terms of environmental rights, which weakens these rights a bit more in French courts.

Whatever the reasons for these failings, the limited effectiveness of invoking rights in order to defend social and environmental justice leads the author to remind us that these are only one of the modes of action of political movements. Far from any bitterness, the book can then conclude on a hopeful note. These numerous legal struggles will perhaps serve as a spur to and extension of organised political action.

First published in laviedesidees.fr, on 6 April 2022. Translated by Kate McNaughton, with the support of Cairn.info. Published in booksandideas.net, on 25 April 2024