# LEGAL CONSIDERATIONS AND THE PROTECTION OF THE BIO-ENVIRONMENT

**Dr. Angelos K. Tsichrintzis**
Attorney-at-Law
Greece

It is my honor to address this audience which has assembled for the protection of our bio-environment, an area where today's society does not score very high marks. In legal conferences, we usually have the luxury to start our address of a certain issue with expressions such as "it is my pleasure..." or the like. Unfortunately, I cannot use the same pattern today in my approach to the issue of biopolitics and the law.

To explain, let us imagine a semi-closed sea whose waters take approximately 80 to 100 years for one complete renewal, and, its coasts are inhabited by over 120 million people (expected to reach 200 million by the year 2000). An additional 100 million tourists visit the same coasts every summer. Approximately 120 coastal cities pour 85% of their city wastes into that sea, and the latest UNEP report qualifies 1/4 of its coasts as unsafe for swimming and around 95% of its shellfish are harmful to health. This sea which accounts for approximately 1% of the total sea volume of the globe, receives about 1/6 of the worldwide sea pollution from oil. What would you call a sea like this? Its name since antiquity has been the Mediterranean Sea.

The example was chosen not because of its uniqueness, but rather because of its proximity to our venue today. This is the very reason why I cannot feel happy addressing the topic of Biopolitics and the Law. When I consider that while the problems of our bio-environment have accumulated and increased so much, the law has only recently started to deal seriously with this matter, and still examines only very basic legal issues.

Being so close to the Earth Summit, the first worldwide United Nations top level conference for the environment, the law still tries to resolve issues such as who has a lawful interest to file a claim against an environmental polluter. The constitutions of European states are split between those that consider protection of the bio-environment as an obligation of the State, and those that define it as an interest of every citizen. It appears that jurisprudence has not decided yet on whether the bio-environment should be protected as an interest of the human race, on the basis of an anthropocentric theory, or whether it should be viewed more broadly as an interest of society as a whole and of nature itself. Of course, we should not underestimate the difficulty of the task of the legislator who is charged with finding the right balance between economic interest and interest for the preservation of the bio-environment, a relation often, if not always, in inherent conflict.

A decision on this basic question of jurisprudence, i.e., who holds the right to raise the claim in favor of the environment, shall contribute to the gradual disassociation of the lawful interest from the concept of violation of an individual right and its connection with the risk of infringement of a social right or even the public order. That would in turn broaden the circle of persons and/or legal entities entitled to raise claims in favor of protection of the bio-environment.

Further, more determination of the basic point also affects the liability theory applicable on actions harmful to the bio-environment. Namely, the transition from an individual rights theory to a public interest theory also contains the element of progress from general liability theory to strict liability principles. This trend towards a strict liability theory, which was established by the Brussels Convention in 1969, has been subsequently reversed by the Barcelona Convention (1972) and others. We are therefore at odds now as to whether there is an internationally acceptable theory either concerning the holder of the right or the liability principles applicable on anti-environmental behavior.

At this point, at the risk of sounding terribly fundamental, I would like to refer to a basic point in the theory of Biopolitics: the distinction between Environmental Law and the Biopolitics approach.

The theory of Environmental Law tries to create a legal framework that establishes a defense mechanism for the environment, in a way that regulates - (or even halts) economic and technological growth so that they stop short of any adverse effects on the environment. It acts ex post, as an external factor to prevent scientific growth from trespassing the mark beyond which it upsets the balance between economic growth and ecological interest.

The Biopolitics approach, on the contrary, attempts to integrate the concerns for protecting the bio-environment into the principles of the individual sciences so that any definitions, rules, or conclusions of the legal or any other science have already taken into account environmental considerations. Thereby, considerations of protection of the bio-environment do not set, in Biopolitics, a check-point or, even less, a limit to the development of other sciences, human or technological. Rather, bios preservation concerns development into a value system setting the scientific principles and promoting the development of those sciences.

In economics, in order to approach the issue from the perspective of corporate law, we should note that it is only natural that the impact of an economic activity on the environment does not constitute a parameter in any economic theory applicable in today's corporate world. Economic

theory is focused on the maximization of numerical factors which exclusively refer to quantitative data, turnover, profit, production cost, and never from the numerical expression of qualitative aspects. Similarly, production cost function or opportunity cost definitions never take account of the environmental impact of a given activity.

One may argue of course, that the micro-economics and corporate finance theory, being private sector economics, should not be expected to suppress the economic indicators of their activity upon the environment and, therefore, increase costs by investment in pollution control mechanisms or application of alternative energy sources (electricity, air, water, etc.). Unfortunately, though, the case gets worse when we deal with macro-economics. The State, as such, is the party primarily expected to protect and promote the environment, thereby promoting the development and quality of bios therein. That notwithstanding, states have demonstrably failed so far to internalize environmental damage in the cost of economic activity.

Measures repeatedly proposed in international fora, such as environmental taxes linked to the use of resources or the harmful emissions of economic activity, have, therefore, found no applicability. Instead, states imposed energy control mechanisms (e.g. catalytic car engines), emission control mechanisms (e.g. air filters) or recycling procedures, in an attempt to protect the environment. That is, they tried to protect the bio-environment by developing new, external factors that can limit or stop the harmful effects of economic activity – Factors to be produced – which presuppose industrial production that needs control mechanisms for achieving environmental protection.

States never tried to protect the bio-environment by building into the criteria of economic activity of the private sector certain factors that could exercise prudential control, rather than ex post, regulatory intervention over the system. The result: disputed effects of the energy control mechanisms (catalytic engines are recently rumored to be more damaging to the environment than regular ones); limited and difficult-to-supervise application of emission controls; unsuccessful promotion of recycling (in California, an accumulation of huge quantities of paper, glass and plastic; few factories convert them; and only aluminum cans are recycled because it is cheaper than producing new ones). This is not to say that the imposition of an environmental tax is a non-controversial measure. For example, the EC proposed an energy tax of $3 per barrel, to reach $10 per barrel by the year 2000. Industry fiercely opposes it, claiming that the tax would render them non-competitive vis-a-vis foreign industries which do not have this tax, primarily the US. It is also expected to channel industrial investment out of the E.C.

The distinction between prudential control and regulatory intervention is vital in this context. It must be realized that environmental considerations should become one of the determining, if not decisive, factors of corporate decision-making. It must be realized also that protecting and preserving the environment not only is compatible with economic development, but that the environment constitutes its premise and its limits.

Using, once again, the example of the Mediterranean Sea, to stress the importance of this compatibility between economics and the environment, problems with the Mediterranean became acute in the 1970s. On the initiative of the environmental sector of the United Nations, UNEP, seventeen coastal states (except Albania) and the E.C. signed the Barcelona Convention in 1976, and the four accompanying protocols. The two latter protocols address the more abundant pollution sources and the more distinct areas of environmental concern: coastal sources of pollution and specially protected areas. In 1980, the Mediterranean States executed the protocol for pollution from coastal areas which addresses pollution from city wastes, industrial waste, and chemical substances used in agriculture. It contains two lists of polluting substances, a black list and a gray list, setting criteria for the qualification of waste under either of these two lists, and provides for mandatory existence of processing units for such kinds of waste. The protocol was put into force in 1983 and it is estimated that its total cost will reach around 15 billion dollars over the next few years.

In 1982, the Mediterranean States executed the protocol for specially protected areas (SPAs), which aims at protecting endangered species. It included in its list about five hundred endangered species, from which, one hundred exist only in the Mediterranean Sea. A regional center for SPA was established in Tunis in 1985, and began operations in 1987. It has already classified 51 areas as SPA and proceeds its research by aiming to include an additional 50 areas within the next year.

The legal system is only beginning to deal with the environmental degradation caused by man, a problem which is becoming increasingly difficult and larger in scope. Fortunately, steps are being taken at the international level, not just the regional level. Biopolitics, being a step ahead of just reacting to the problem, tries to set the principles by which sciences, legal systems, and economic activity can gauge their progress in such a way that is compatible with the preservation and development of the bio-environment.

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Dr. **Angelos K. Tsichrintzis**, Attorney at law was admitted to the New York Bar, USA in 1988 and the Athens Bar, Greece, in 1989. He studied at the University of Athens Law School (LL.B. 1984), Harvard Law School (LL.M., 1985), Harvard Law School (S.J.D., 1986). He is author of numerous articles mainly on the legal aspects of banking and trade. Dr. Tsichrintzis is a Member of the New York State Bar Association, the American Bar Association, the Athens Bar Association. He is a General Consultant in Violex-Bic S.A., a Member of Board

of Directors of National Securities Company S.A. and a Member of the Hellenic Center for Banking Research and Education.