Theoretical and Practical Aspects Regarding Property in Environmental Law

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Abstract. This article analyses the problem of property in environmental law from the point of view of obligations natural persons or legal entities have for the protection of the surrounding environment.

Environmental policy shall set the strategies, methods and means used in actions that have environmental protection as their final aim. This type of policy may only be conceived in the general context of economic development, with mid-term and long term economic and social prognosis.

In our legal system we have legal regulations on soil protection, forest funds and human settlements.

There is a simple and natural correlation between economic activities, environmental protection and environmental law.

We also consider that co-involvement is essential in environmental law for environmental protection and development. This should be based on the idea of owner, economic agent and producer.

Keywords: property right, environmental protection, legislation, legal liability, co-involvement, environmental policy, economic policy.

INTRODUCTION

Property right also imposes certain obligations related to environmental protection. This is realized by adopting an environmental policy in compliance with economic development programs, while the state has to co-ordinate environmental protection activities (E. Lupan, 2000; S. Baughem, 2002).

Art. 35 of the Romanian Constitution recognizes the right of every person to a healthy environment and establishes the obligation of the state to ensure the legislative framework for the exercise of this right and the obligation of natural persons and legal entities to protect and ameliorate their surrounding environment. There are similar constitutional regulations in Moldavia, Portugal, Spain, Croatia, Hungary, and Slovenia.

We would like to mention that the right to a healthy environment as a fundamental right is also recognized at international level (M-E. Oțel, 2005).

Besides the constitutional regulations mentioned above, art. 44 (7) of the Romanian Constitution also provides that: “the property right obliges to compliance with environmental protection and good neighboring tasks, as well as compliance with other obligations that according to law or custom are incumbent upon owners”. Pollution and other sources of incommodity are included here, which render in fact new dimensions to the concept of „neighborhood”, reflecting its consequences under other aspects than strictly geographical ones.

The foundation for (abnormal) neighborhood annoyances is centered on the idea that life in a society imposes the toleration of certain normal inconveniences resulting from neighboring relationships, that there are admissible pollutions and damages up to certain limits that vary according to place and time. Beyond these limits, civic liability comes into
play, the right to remedy is born and a normal neighborhood annoyance transforms into an abnormal annoyance.

Recourse to such an approach has the advantage of dispensing the claimant from probing the existence of fault, which is very difficult, but – due to multiple doctrinaire contradictions - especially the jurisprudence from Western countries has admitted that annoyances may also result from legitimate exercise of the property right not only from a faulty exercise. For example, constant watering of plants in the proximity of a neighboring wall, even if not abusive, it engages the liability of the author for creating permanent humidity. Such excessive deficiencies, which neighbors should not suffer, bring forth a guarantee obligation under the form of liability without fault. Therefore, the right to compensation is not legally founded on the damage maker’s behavior, but on everyone’s right of not being deprived, totally or partly, of the value of a good or situation and the advantages entailed.

The objective characteristics pertaining to the abnormality of the damage depend on the time and gravity. Therefore, a permanent duration, whether definitive and perpetual or extending and renewing, becomes a source of compensation. But the objective character related to gravity is also necessary because only reuniting these two elements gives birth to the right to compensation. Gravity is defined by means of a unit of measurement and it is considered that – in order to be punished – neighborhood annoyances may not necessarily be excessive; it is enough if they are abnormal. Subjective characteristics pertain to the personal situation of victims, taking into consideration the place of the damage and the victim’s economic and social profile.

MATERIALS AND METHODS

In order to put into practice the idea of environmental protection in the context of obligations resulting from the property right, an „environmental policy” in the true sense of the word has been elaborated. This appears as an orientation and organization of the complex environmental protection activity meant to establish the rules, methods and means used in actions that have environmental protection as their finality (E. Lupan, 2001).

Environmental policy is integrated into the economic policy of the state and it comprises environmental protection means, the aim of this activity from an organizational, administrative, financial, technical and legal point of view, as well as the moral and educational aims for the formation of environmental consciousness. This policy should also be used to establish the global orientation regarding state sanctioning systems and the level of coercive measures for breaching legal norms on environmental protection, including non compliance with obligations resulting from property right vis-a-vis environmental protection. The scientific foundation of the environmental policy and its materialization in a coherent legislation is a continuously developing problem, development which may only be in progress and permanent evolution.

In order to realize this objective it is necessary to take into consideration the orientations formulated by international organizations, such as those of the UN. During the course of time – Stockholm 1972, Rio de Janeiro 1992, a series of principles have been formulated which are in fact obligations for UN member states, a series of recommendations addressed to states in order to take the necessary measures for environmental protection. In Rio de Janeiro the „Earth Book” has been elaborated with its 27 principles and three resolutions which comprise the most important current obligations regarding environmental protection (D. Marinescu, 2007).

Environmental protection policy, as part of the general economic and social development, may only be conceived within the general context of economic development,
with mid-term and long term economic and social prognosis. Economic development may not be discussed without getting to the property right as essential aspect.

Thus, environmental policy/policies shall also be harmonized with economic development programs.

The correlation between economic development programs and environmental policies is natural if we take into consideration that the multiplication of global economic and environmental problems does not have the same quantitative and qualitative causes, namely:

1. From a quantitative point of view, the relationship may be explained by the fact that in the past the Earth’s population and economic activities were less important from the perspective of the biosphere, while in our days the situation had radically changed because economic activities and the activity of transforming nature had become significant from the point of view of the biosphere;

2. The qualitative cause regards a significant increase in the inter-conditionality between states in the domain of production, transports, telecommunications etc.

Under such conditions, the relationship between economic policy and environmental policy becomes even tighter, having an international co-involvement at its basis. Irrespective of the development policy from a given moment, a conception regarding the theoretical and practical measures of pollution and de-pollution may not be absent from the global policy of a state.

Taking into consideration the dimensions and the variety of environmental pollution, on the one hand, and the size and importance of obligations regarding environmental protection, we may naturally draw the conclusion that the formulation of certain scientifically founded conceptions regarding the realization of a non-polluting economy or a less polluting economy assumes a policy for the protection and development of the environment, as a separate policy within the framework of the global policy of each state which is correlated with the other forms of global policy.

Environmental policy is closely related to the level of economic development of a society. Economic policy accomplishes the relationship between environmental protection and development policies, investment policy etc., having in view the economic development of a society in accordance with environmental protection policies, while as far as both these policies are concerned, to ensure – by means of financial policies – the necessary costs for accomplishing both aims: economic development and environmental protection (M. Duțu, 2003).

The relationships between economic activities, environmental protection and environmental law appear in a natural manner, as a logical and simple correlation; the development of economic activities may only be obtained through taking the necessary measures for the prevention of environmental pollution, and taking these measures is an obligation established by environmental law.

This legislation is dominated by the idea of the necessity of economic development based on the maximum fructification of a state’s material and human resources, yet complying with environmental protection requirements.

The appearance of a new problem in the process of economic and social development and the complex character of environmental protection and development represent a constant challenge for legal policies. The legislator is oriented towards detailed regulation, by means of imperative norms, of inter-human relationships formed in relation to environmental pollution within the framework of certain economic activities, ensuring the necessary legal framework for combating pollution.

Usually, both the measures established for accomplishing economic policies and those regarding environmental protection take the adequate legal form; there are codes, laws, governmental decisions, ordinances, minister’s orders etc. The elaboration of an efficient
system of legal means in the field is one of the state’s fundamental obligations, thus the existence of certain texts in this sense in fundamental laws – Constitutions (see art. 44 of the Romanian Constitution) is also explained. In this direction, during the last years important steps have been taken through the adoption of an adequate national legislation (new or renewed) and the participation at the adoption or adherence to certain international documents adopted earlier.

The current Romanian legal system for environmental protection comprises: the obligation to do something for environmental protection, and to the same purpose, the obligation not to do, expressed through certain prohibitions (for positive obligations: ensuring soil protection; placing, planning and start-up of objectives of any kind, complying with the conditions provided for in the Environmental Approval and Authorization; and for negative obligations: the prohibition on burning vegetation without authorization from competent authorities for environmental protection; the prohibition on changing the category of use of agricultural lands that represent areas for the protection of monuments). However, practice in this domain is rather scarce as compared to other European states, for ex. France.

In our legal system we have legal regulations for soil protection, forest protection and human settlements. We have selected these legally regulated segments taking into consideration the subject of the present study.

Soil is one especially important component of the biosphere. Massive industrialization led to increasingly higher quantities of toxic metals penetrating the atmosphere. From the atmosphere, rain and snow take these metals to the soil, where they accumulate. Soil pollution is also caused by noxious dust and gases from the air, from residual waters, by industrial or household waste, but especially by pesticides and chemical fertilizers used in agriculture (Şt. Țărcă, 2005).

Besides physical and chemical pollution, in the immediate vicinity of mining units and in places where radioactive metals are stored radioactive pollution of the soil may be observed.

Soil destruction is the result of pollution. A series of legislative measures have been and are taken for the sake of durable soil conservation, both qualitative and quantitative. The central authority for environmental protection establishes: the system for monitoring soil quality in order to know its present quality and its tendencies of evolution; the regulations regarding the protection of soil quality, of ecosystems and biodiversity; the fight against soil erosion; regulations for recreating the natural habitat in areas where the soil and the substratum have been affected by natural phenomena or activities that have a negative impact on the environment.

For the sake of qualitative soil protection, soil conservation and amelioration works are executed by landowners or through their care by specialized units. The affected areas are considered areas of amelioration and their owners receive help from the state if they wish to execute these amelioration works by themselves.

Funciary planning and improvements are also especially important. The serve to prevent, reduce and eliminate land destruction processes caused by natural factors – dryness, floods, excess humidity.

The administrators of public utility land improvements shall, among other things, follow the impact of these works on environmental factors and apply correction measures if they observe negative tendencies, established through technical-economic and/or ecological documentations.

As for quantitative land protection, the Law on land resources sets forth the principle of keeping agricultural lands and their use for productive purposes. For the practical realization of this aim, the law establishes the rule according to which telecommunication and energy transport and distribution lines, water and gas supply pipes shall be placed in the
immediate vicinity of communication channels so that they would not obstruct the execution of agricultural works.

Occupying the lands necessary for the remedy of derangements in case of accidents and the execution of maintenance works at the above mentioned objectives shall be carried out urgently, also having the prior approval of landowners.

In each case, agricultural land owners have the right to compensation for damages caused.

If soil protection and amelioration legal provisions are breached, the contravention and penal liability of those who are guilty is triggered, according to the laws in force.

Forest funds represent another natural element regulated by environmental policies. They may be the object of public or private property. Any land covered by forest vegetation that is bigger than 0.25 hectares is considered forest, according to the Forest Code. The entire national forest fund, irrespective of its property form, is subjected to the forest regime and compliance with it is mandatory for all forest or other owners.

As wealth of national interest, the durable administration of forests assumes a series of concrete administration, maintenance, rational exploitation and regeneration measures oriented towards: ensuring the integrity of the national forest fund, ecologic reconstruction of forests destructed by natural factors, maintaining the volume of annual wood crops, ensuring forest health.

Natural persons and legal entities who own or administer forests, economic agents certified to execute forest exploitations and forestry departments shall use technologies that do not destroy the soil, do not pollute the water and do not destroy trees which are not for exploitation.

As for forestry funds owned by the state, they are administered by the National Forestry Agency, according to the Forestry Code.

Public property forests owned by administrative-territorial units, as well as those jointly owned are administered by their owners through forestry structures similar to those of the state.

Private forest owners, individuals or associations, may require the territorial units of the National Forestry Agency to administer their forests based on administration agreements.

The reduction of national forestry fund areas is prohibited, and permanent or temporary occupation of areas from this fund is only possible with the consent of the owners, followed by approval from different competent state institutions according to the size of the area in question.

In this context as well, we would also like to mention that in the Forest Code the contingent fructification of forest products, namely wood, non-wood and accidental (those that are the result of natural calamities or of approved cutting) products.

The exploitation of wood products shall be carried out according to the mandatory technical norms provided by law, based on the authorization issued by forestry units.

Similarly to soil protection, breaching legal provisions on forest funds will attract the legal liability of those guilty.

Human settlements are the most complex social structures in which environmental protection norms intersect each other most completely.

By „human settlement” we understand a locality of any level: city, parish, village, farm and they represent administrative-territorial units. They include constructions, apartments, public and private institutions, industrial platforms, markets, rest and entertainment areas, in general everything that exists within the administrative limits of a locality and it is created by humans.

Human settlements, also called human ecosystems, unite the components of the global concept of environment, namely: natural environment, human environment, modified
environment, set-up environment, built environment, artificial environment and physical. All these components constitute the prerequisite of environmental legislation, applied in human settlements on two levels: at the level of natural environment and at the level of the artificial environment, built by humans, also called anthropic environment.

Industrial urban society is born simultaneously with the industrial and technological revolution. Urban development becomes a universal phenomenon. The city, as privileged model of modern technologies, encompasses all the contradictions of modern civilization. Where cities developed, the natural environment has been affected, leaving traces and spots of green which become insignificant and have no influence and which may not constitute a coherent and balanced ecosystem.

In order to ameliorate these shortcomings, a system of legal regulations has been developed which in the first place is aimed at the protection of the natural eco-factors from the environment: atmosphere, climate, waters, soil, substratum, vegetation and all these are reflected in the quality of the natural environment. For example, legal norms have been elaborated for: the authorization of constructions, the regulation of economic and social activities that have an impact on the surrounding environment, environmental evaluations that are carried out for road plans and programs, etc.

Non-compliance with legal provisions attracts the liability of local public authorities, of natural persons and legal entities who are liable for: the improvement of the urban microclimate; the adequate placement of social-economic objectives and public utilities; rational traffic administration; the optimization of population density.

The aspect that refers to environmental protection in urbanism and land planning documentations is very important in the context of our study.

A series of technical rules that refer to the maintenance and amelioration of the natural and anthropic landscape of each area and locality are set as general measures for the elaboration of urban development plans, sanitary protection measures for the caption of drinking water, as well as other aspects that are specific to each separate documentation, according to its size and fundamental aims.

We would also like to mention that ensuring compliance with general urban development and land planning rules is carried out through construction permits, by means of complying with the system of quality in construction and hygiene and public health norms.

Compliance with laws and the application of ecological principles during different human activities require respect for a series of conditions and obtaining certain approvals and authorizations (D. Marinescu, 2003).

Concretely, before initiating the mandatory authorization process of activities that produce a negative impact on the environment, for the adoption of certain plans and programs in domains explicitly provided for by law, environmental evaluation is necessary. This consists of the elaboration of an environmental report, consulting the public and the authorities involved in implementing the certain plans and programs. As a result of carrying out the environmental evaluation and analyzing the environmental report the competent authorities issue the Environmental authorization which sets the conditions for the approval of plans and programs in certain domains, for example: urbanism, energy, and water management.

Within the context of our present topic we would like to mention that although the evaluation of environmental quality starts with the concept of property right as decisive element and legally regulated, the economic prejudices of the property through environmental protection measures may not be neglected.

Thus, irrespective of the form of property – public or private, when initiating economic projects it is necessary to evaluate their impact on the environment even if the land is outside the areas from the NATURA – 2000 network. The technical documentation
necessary for issuing environmental permits starts from the owner of the investment and the investment objective which are correlated with polluting sources and the protection of environmental factors for the quality of water, air protection, soil and substratum protection, protection against radiations, the protection of human settlements, waste management and the management of toxic and dangerous substances.

The relationship between property and environmental protection becomes very complex when also natural risks intervene: landslide, flood, the remnant effect of organoclorurate pesticides such as Aldrin, DDT, Heptaclor, Lindan in the soil, with a persistence of 14-15 years or even more.

We would like to underline again that the relationships between economic activities, environmental protection and environmental law appear as a simple and natural correlation. The development of economic activities may only be obtained through necessary measures for the prevention of environmental pollution and taking these measures is an obligation established in environmental law.

As for legal liability, it should be observed that the most serious form of illicit acts, namely the *environmental crime*, qualified as crime against durable development, is present in our legal system as well.

The Penal Code comprises a chapter entitled „Environmental crimes and misdemeanors”, in which breaching the rules regarding soil, water and forest protection are incriminated, crimes for which natural persons and legal entities are responsible for. We consider that these texts, mainly borrowed from laws on the protection of environmental factors, have been conceived in order to become general norms in the field and in order to ensure a certain legislative stability in a very dynamic field.

Besides environmental protection at national level, we shall also take into consideration the international system for environmental protection. The system comprises world organizations (O.N.O, UN Environmental Program), regional organizations (Council of Europe, Organization for Economic Cooperation and Development) and sub-regional organizations (Danube Commission for navigation, Sub-regional Commission for the application of the Helsinki Convention from 1974).

Taking into consideration the topic of this paper, we consider that co-involvement in environmental protection and development – based on the notions of owner, economic agent, producer, natural person consciousness – is one of the options for reaching this aim. This method is more efficient than the one based on legal liability, because the prevention of pollution and the development of environmental conditions should prevail in environmental law, activities which lack legal liability that is only engaged for bearing the consequences of pollution to the extent of the its author/authors’ contribution to its production (Michele de Salvia, 2003; D. Abrahams, 2000).

CONCLUSIONS

Property right also imposes certain obligations related to *environmental protection.* This is realized by adopting an environmental policy in compliance with economic development programs, while the state has to co-ordinate environmental protection activities. Environmental policy shall establish the strategies, methods and means used in environmental protection actions.

Environmental policy and economic policy have a legislative reflection at national and international level.

The current Romanian legal system contains regulations regarding the legal protection of soil, forest funds and human settlements. In each situation of non-compliance with
protection measures established by law, contraventional liability or even penal liability is triggered.

We consider that co-involvement in environmental protection and development – based on the notions of owner, economic agent, producer, natural person consciousness – is one of the options for reaching this aim. This method is more efficient than the one based on legal liability, because the prevention of pollution and the development of environmental conditions should prevail in environmental law, activities which lack legal liability that is only engaged for bearing the consequences of pollution to the extent of the its author/authors’ contribution to its production.

REFERENCES