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Legislative concept of environmental protection law in Poland vs new technological solutions

Legislative issues of environmental protection are not easy when it comes to practical and theoretical aspects. Difficulties have several causes which at the same time determine accepted solutions. Efficiency and functioning of environmental protection legal norms determine good legislation. Aforementioned circumstances overlap with requirements concerning the legislative level resulting from the standards of a democratic legal state. On the other hand, the legislative concept accepted in a given legal system is potentially connected with new technological solutions in that system. The level of difficulty of introducing new technologies to a legal system depends on the flexibility of the concept.

It seems that difficulties in establishing a good environmental protection law apply to all countries. The Polish legislator deals with similar problems. As a consequence, they come across the same difficulties with introducing new technologies within environmental protection.

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This study is to characterize the difficulties the Polish legislator comes across in establishing legal norms of environmental protection. It also explains which concept dominates as well as assesses its good and bad points in the context of introducing new technologies concerning environment and its protection.

It has been pointed out that establishing legal norms protecting the environment encounters specific complexity. The first of them is the lack of uniform opinions if the law on legal protection is treated as a separate legal branch. Opinions concerning this notion present extremely different stands, from the one pointing out the autonomy of the environmental protection law as a separate legal branch to the other saying that it is only a branch of the administrative law¹. The lack of uniform opinions does not allow to assess explicitly whether it is a separate legal branch. This determines the legislator's stand towards the environmental protection law.

Another reason of complexity in legislation of the environmental protection law is the scope of regulations which are covered by it. These notions are important due to the fact that specific legal acts, which the environmental protection law consists of, need to be coherent. The point is that one should use the same definitions. More important is the fact that the same axiological foundations lie at the root of all legal acts. Another point is not to regulate specific issues once or twice or even more times in different legal acts.

The third reason of the difficulties is the specific language of the environmental protection law which has to take into account notions and terms of biological, ecological and even economic sciences. A legislator has then problems with defining the notions which are not legal language notions. They also have problems with adjusting the terminology of biological and ecological sciences to the specificity of legal language².

The fourth reason of such problems is the specific dynamism of the contemporary environmental protection law manifested in frequent and numerous changes. This dynamism is not in favour of conceptual stability of the environmental protection law since it is easier to upset axiological,

¹ Cf. M. Podolak, J. Stochlak, *Ochrona Środowiska w Polsce Studium prawnopolitologiczne*, Lublin 2006.

² Scientific branches describe the same phenomena using different terms. In the Polish law in the Civil Code the term 'fixed property' is used while in the environmental protection law 'the surface of the Earth'. In my opinion both terms are correct.

terminological or linguistic unity. In my opinion, in such situations constitutional regulations are important. In the Polish law, these are articles 5, 2 and 7, article 68 section 4, articles 74 and 86 of the Constitution of the Republic of Poland dated on 2 April 1997³. The Constitution of the Republic of Poland acts as the basis of the Polish environmental protection law, guaranteeing not only its axiological coherence but also stability which is extremely important in case of Polish regulations.

All the mentioned circumstances affect the legislative concept of the environmental protection law not only in Poland but also in all legal systems since the raised difficulties are of universal character.

In the doctrine of the environmental protection law it is pointed out that four legislative solutions of regulating the issues of environmental protection are possible. J. Sommer indicates the possibility to accept the environmental protection code, framework act or comprehensive act. As the fourth proposal, he accepts multitude of acts regulating this sphere of social conditions⁴.

In case of proposals concerning the codification of the environmental protection law one has to deal with the regulation of a comprehensive character. The demand of unity and uniformity would be fulfilled without any doubt. It would be also possible to guarantee the terminological uniformity as well as stability of the environmental protection legal system. Such a solution has been accepted in Italian legal system⁵.

However, there are also arguments against the codification such as the fact that in the legislation one can see the twilight of codification. Another argument is that codifications are characteristic for traditional branches of law, such as penal or civil law. However, in our times distinguishing legal disciplines does not aspire to the code regulation. It is also emphasized

³ Journal of Laws, No 78, item 483 with amendments, further referred to as the Constitution of the Republic of Poland.

⁴ J. Sommer, *Efektywność prawa ochrony środowiska i jej uwarunkowania – problemy udatności jego struktury*, Wrocław 2005, p. 91, further referred to as J. Sommer, *Efektywność*.

⁵ See L.O. Atzori, F. R. Fragale, G. Guerrieri, A. Martelli, G. Zennaro, *Il Testo Unico Ambiente. Commento al D. Lgs. 3 aprile 2006, n. 152*, Simone 2006; F. Giampietro, *Commento al Testo Unico ambientale*, Ipsoa 2006; B. Caravita, *Diritto dell'ambiente*, Bologna 2006; L. Costato, F. Pellizzer, *Commentario breve al Codice dell'Ambiente*, Milano 2007; F. Marchello, M. Perrini, S. Serafini, *Diritto dell'ambiente*, wyd. VII, Simone 2007; G. Paola, w: *Manuale Ambiente*, Ipsoa 2007.

that administrative law regulations are not suitable for codification from a traditional point of view⁶.

The codification of the environmental protection law narrows the flexibility of a legislator at the same time restricting his openness to new technological solutions which could be applied within environmental protection. In case of new technological solutions quick legislative actions are necessary which is difficult when it comes to codification because codes undergo changes due to their nature.

The code concept is similar to the one of a comprehensive act which fulfils the same purpose as a code, i.e. it aims at regulating as many issues as possible. As a consequence, the arguments for codification find grounds also in case of a comprehensive act. This kind of act is probably more flexible concerning its possible changes. That is why it can be a more useful solution for a legislator who wants to regulate quickly new technologies in a legal system of environmental protection. However, there is a danger that introducing new technologies to the system of environmental protection by establishing legal norms requires extensive changes of the whole legal act, even if they only refer to one element of environment⁷.

The third concept consisting in regulating the issues connected with environmental protection assumes enacting a framework act having a character of general rulings of the environmental protection law. Such a concept, as J. Sommer aptly notices, was not accepted and *de lege lata* it cannot be accepted in the Polish legal system. It results from the fact that the legal system origins, commonly applied, regulated in article 87 and further of the Constitution of the Republic of Poland, do not cover so-called organic laws. The regulation constitutes that: '1. The sources of commonly applied law of the Republic of Poland are: the Constitution, acts, ratified international agreements and directives. 2. The sources of commonly applied law of the Republic of Poland are the acts of local law in the area where they operate.' Thus there are no normative reasons for distinguishing more or less important acts or specific and ordinary acts. The range or the meaning of an act is specified by its place in a legal system, the scope and the subject of a regulation as well as the meaning this act has for a branch or a division of law. That is why, from the point of view of the Polish law, a framework act loses its *raison d'être* due to the lack of constitutional bases.

⁶ Journal of Laws, quot. p. 92 and further.

⁷ E.g. water purification technologies.

However, when it comes to usefulness of such a concept for considering new technologies in the field of environmental protection in the legal system, it should be noticed that it is not the most flexible concept. A framework act would play the same role as a code, but it would not be a legislator's will to regulate all the issues in this act. But such an act would normatively get the superiority status over another acts within a branch or a division of law. Any problems to change a framework act due to its purpose and required stability are the same as in case of a code. This concept lacks flexibility necessary to regulate new technologies concerning environmental protection.

The fourth of the distinguished concepts assumes existence of separate acts not connected with each other by a comprehensive or framework act. In the event of accepting this concept a legislator will obtain necessary flexibility of accepted solutions in the field of using new technologies. However it would be extremely difficult for a legislator to retain the unity of used terminology and the complexity of regulations. This can be a major problem in the practice of applying environmental protection law.

As far as the assessment of the legislative concept of the environmental protection law in Polish legal system and usefulness of this concept for applying new technologies is concerned, it should be pointed out that this concept is not clear. Without any doubt, while assessing the Polish legal system one should exclude the code concept as well as the concept of a framework act. Although the first of these concepts is acceptable, the basic legal act concerning environmental protection – the act dated on 27 April 2001 *The environmental protection act*⁸ – does not qualify as a code. It means that *de lege lata* the Polish legislator rejected the code concept.

As mentioned before, the framework act concept is not acceptable due to the fact that the constitutional system of legal sources commonly applicable does not know such acts.

We are left with either the concept of a comprehensive act or the concept of different acts not being connected by a leading act.

It seems that in the Polish law one has to deal with a mixed concept comprising the elements of a comprehensive concept and a concept of different acts not being connected by a leading act. In the doctrine of the environmental protection law practically one opinion dominates, i.e. the environmental protection law is the leading act in the Polish environmental

⁸ Journal of Laws of 2008, No 25, item 150 with amendments, further referred to as the environmental protection law.

protection legal system⁹. The thesis is justified by the tradition of legal regulations in the Polish environmental protection law because the previously applied act (dated on 31 January 1980 on the protection and shaping of the environment¹⁰) was also of a leading character.

The evidence of this legal act's leading character is for example the act glossary found in article 2, explaining basic notions such as environment, environmental protection, environmental diversity, sustainable development, etc. This glossary is so important that other legal acts counted among environmental protection law refer to it¹¹. Secondly, this act comprises rules of the Polish environmental protection law expressed in articles 4–12 of this act¹². Thirdly, solutions concerning the protection of some natural elements, accepted there in a very general way¹³, show its leading, however not aspiring to a comprehensive act, character.

After all, neither the protection and shaping of the environment nor environmental protection law can be treated as framework acts due to the reasons mentioned before. They cannot be treated as comprehensive acts as well because it should be noticed that none of these acts, especially currently applicable environmental protection law, aspire to be called acts. The purpose of a comprehensive act is to regulate the whole or at least the major part of the matter which should be regulated within a given legal branch. Although the environmental protection law regulates the major part of environmental protection law, it does not regulate the whole of it. The part which is not regulated in this act does not deserve to be called a comprehensive regulation.

One of the important circumstances is that there is no possibility to regulate matters concerning environmental protection in one legal act which would be of a comprehensive act character. The diversity of such

⁹ Cf. J. Ciechanowicz-McLean, Z. Bukowski, B. Rakoczy, *Prawo ochrony środowiska. Komentarz*, Warszawa 2007; K. Gruszecki, *Prawo ochrony środowiska. Komentarz*, ed. II, Warszawa 2008.

¹⁰ Journal of Laws of 1994, No 49, item 196 with amendments.

¹¹ E.g. The water law.

¹² On 16 November an act is going to be introduced on making information on the environment and its protection available, the participation of society in environmental protection as well as assessment of the influence on the environment (Journal of Laws) which changes the concept of environmental protection law by regulating issues already regulated in art. 9–12.

¹³ Apart from air pollution, noise and magnetic field control.

matters makes both practical conducting of such a legislative process and efficient functioning of the law in practice impossible. So detailed matters have been left to regulations of detailed acts, except for the environmental protection law.

It should be also pointed out that the criteria of separating matters which should be regulated in the environmental protection law from the ones which should be regulated in detailed acts is quite clear and coherent in the Polish law.

The criterion of protecting different natural elements is the basic one. Practically each natural element has been regulated in a separate act in the Polish law.

For instance the protection of minerals is mostly regulated by the geological and mining law dated on 4 February 1994¹⁴.

The surface of the Earth is protected by several legal acts, especially by the act dated on 27 March 2003 on Spatial Planning and Development¹⁵. Also the act dated on February 1995 on the protection of farming and forest lands¹⁶ comprises the norms protecting the surface of the Earth.

The Water Law¹⁷ dated on 18 July 2001 as well as the act dated on 6 June 2001 on collective water supply and waste management¹⁸ regulate issues concerning protection of water and natural environment against waste.

Air protection and protection against radiation are beyond the legislative system described before. These notions are regulated in the environmental protection law. It is undoubtedly an element weakening the whole concept but it does not cause its whole change.

Summing up, it should be accepted that in Polish legal system the concept of a framework act connected with the concept of separate acts regulating the matter in the field of environmental protection dominates.

The concept accepted in the Polish law should now be assessed paying special attention to the possibility to introducing new technologies. The basic element to be assessed is the flexibility of a legal system, openness

¹⁴ Journal of Laws of 2005, No 228, item 1974 with amendments. This act is discussed by A. Lipiński, R. Mikosz, *Prawo geologiczne i górnicze. Komentarz*, ed. II, Warszawa 2003.

¹⁵ Journal of Laws, No 80, item 717 with amendments.

¹⁶ Journal of Laws of 2004, No 121, item 1266 with amendments.

¹⁷ Journal of Laws of 2005, No 239, item 2019 with amendments.

¹⁸ Journal of Laws of 2006, No 123, item 858 with amendments.

to technological innovations and legal bases justifying introducing modern technological solutions.

Undoubtedly, the concept accepted in the Polish law is flexible since the matter commonly treated as the general part is separated from the matter concerning regulation of particular natural elements. Between particular legal acts there are no very strict relations which would cause the necessity to bring extensive changes in a situation when only one act would need to be changed. Of course the change in the environmental protection law would cause the greatest problems.

It should also be noticed that the Polish legal system is open to technical innovations concerning environment and its protection. It results from the principle of sustainable development lying at the root of it which has a value of a constitutional rule. Moreover, other constitutional regulations defining tasks and duties of public authorities play an important role – article 68, section 4 and article 74 of the Constitution of Poland.

As a consequence, public authorities are not only able to but also should take into consideration matters concerning introducing new solutions in the field of environmental protection. Within their constitutional duties there is also reaction to technical innovations which could be used to protect environment.

Summing up, the environmental protection legal system in Poland depends on the mixed concept. One could distinguish a leading act which could be treated as a framework act being the environmental protection law. However this act does not regulate all the notions connected with environmental protection. The protection of particular natural elements is regulated in different acts which are not strictly related to the environmental protection law. As a consequence, it means flexibility of the concept and its openness to new technological solutions.

An important issue is also the fact that public authorities are obliged to guarantee environmental protection and to be guided by the principle of sustainable development. Within this duty public authorities should also introduce new technological solutions to the Polish legal system which could be used for environmental protection.