THE PROTECTION OF ECO-SYSTEMS THROUGH CIVIL LAW

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Abstract. New Considerations Regarding the Right to a Non-Polluted Environment. For the second time the authors express ideas regarding an issue, which is important, both from a theoretical and practical point of view. The previous ideas were based not only on the former environmental law no. 9/1973 – which did not contain precise provisions regarding the protection of the environment – but also on the international provisions and doctrine in the field. However, the new opinions are based on the provisions of the new law no. 135/1995 which states the right to a healthy environment.

Nowadays, the necessity to ensure the prevention of pollution is a major problem, which needs to be solved in order to ensure the right to a healthy and civilized life to all citizens. An important goal in this field remains still the introduction in the Constitution of some provisions ensuring this important right.

The task of legal protection of the environment was generally carried out especially through administrative tools. This represents a difficulty but not an impediment for the examination of the role of environmental protection through of civil law.

Civil law has been involved, indeed, to the present, in a very small degree in the legal protection of the environment. This can be explained, on the one hand, by the practice of using the law in that particular field, law which granted priority to administrative tools, which gave the same orientation to the doctrine, and on the other hand, by means of reducing the role of civil law to the mending of some prejudice caused through pollution, without considering the issue of protecting environment by means of civil measures of prevention.

Thus, a greater attention should be paid to the application of the legal norms pertaining to the protection of non-patrimonial rights of persons, such as the right to health, life, dignity, to optimal conditions for a decent life level and the ensuring an ecologically balanced environment, to the home inviolability, etc. The right to life and to health can be infringed also by sound pollution, by the production, stocking and transportation of some toxic hazardous substances, by the pollution of water, air, etc. The possibilities which civil courts have in those cases – such as the interdiction of continuation of such activities or actions, the order of stopping some situations which affect such rights, the civil fine, etc. – are, along with the disposition of making amends for the patrimonial or moral prejudice, effective measures which can contribute to the protection of the natural environment (biosphere) or of the man-created environment (technosphere).

In the international documents adopted under the aegis of United Nations Organization and especially in the law literature in the Western countries, a special attention has been paid to settling and analyzing the right to an unpolluted environment.

A problem of principle, which was discussed, is if the right to a healthy environment should be considered as a fundamental right of man or if it is enough that this should only be settled within the chapter of environment rights.
It is a known fact that the fundamental rights (and duties) of citizens are only those consecrated in the Constitution of the State, rights which – through this– are reckoned as essential for the citizens. The fundamental rights written in the Constitution represent the basis of all the other rights citizens can have on the ground of any social regulation, of any judicial documents.

Romania’s 1991 Constitution does not consecrate the right to a healthy environment. There is no such right listed among the fundamental rights of the citizen, even though some rights directly or indirectly concern also the environment protection or the fight against pollution. Thus, in chapter II, our fundamental law establishes the right to life and to physical and psychic integrity (art. 22), the right to free circulation (art. 25), the right to information (art. 31), the right to education (art. 32), the right to the health protection (art. 33), the freedom of gatherings (art. 36), the right to associate (art. 37), the right to work and to the social protection of work (art. 38), the protection of private property (art. 41), the protection of children and young people (art. 45), the right to petition (art. 47) and so on. But this does not mean, not even by deduction, the settling of the right to a healthy environment. Besides, not even the text of the article (art.) 41, paragraph (6), from the Constitution, according to which “The right to property obligates to the observance of the measures regarding the environmental protection and the ensuring of a friendly vicinity, as well as to the observance of the other duties which, according to the law or to the custom, are incumbent on the owner.” (s.n.- E.L.), does not signify that a healthy environment is thereby raised to the rank of fundamental right; nor do we reach this in the light of the text of the art. 134, paragraph (2), letter e), according to which the State ought to ensure “the restoration and protection of the environment, as well as the maintenance of ecologic equilibrium”.

In order to be able to speak of a healthy environment as a fundamental right, our lawgiver should have mentioned it as such in the Constitution, as this right is regulated by the constitutions of other countries. Before the issuing of the Law for Environment Protection, no. 137/1995 (30 December) there was no normative document to foresee, in any form, the right to a healthy, unpolluted environment.

Our lawgiver gave life to the recommendations formulated at the International Conference on the Rights of Man held in Teheran in 1968 (where the call was launched for establishing an equilibrium between the technological scientific progress and the intellectual and cultural moral development of mankind) and especially at the first Conference of the United Nations on environment, which was held in Stockholm, in between 5-16 June 1972, and – even if not at a constitutional level– it settled in a common law the right to a healthy environment.

Truly, on December 30, 1995 the Law of environmental protection no. 137/1995 was published in the Official Monitor (M.Of. no. 304); this is a normative document of great importance for the development of the right of environment in our judicial system, which contains some new aspects of great weight, such as, rendering objective the liability for damage caused within the judicial environment relations, and, what we are directly concerned with in this paper, the settling of the right to a healthy environment.

In the art. 5 from the Law no. 137/1995 it reads: “The State recognizes the right of all to a healthy environment, guaranteeing for this end; the access to information on the environment quality; the right to organize oneself in associations for the protection of environment quality the right of being consulted in view of making decisions regarding the development of environment policies, legislation and norms, the issuing of environment permits and licenses, including those for the plans of territory disposition and city planning; the right to address the administrative or court authorities in view of preventing or in case of a
direct or indirect damage, directly or through some associations; the right to damages for the suffered prejudice."

This is a very important legislative step taken, with multiple consequences for the future, especially for the environment protection practices in our country. In what follows, we will try to briefly examine the five rights guaranteed by the State, which, together with the correlative duties, constitutes the contents of the environment law relation formed in connection with the people’s right to a healthy environment.

Concerning the right to a healthy environment we are dealing with, we should retain that it is, as we have seen, a right guaranteed by the State to all persons, the guarantees being listed in the very text of the law article which recognizes this right. A right recognized to people would have no meaning without the correlative obligation of anyone, which is, in our case, firstly the State. Indeed, according to art. 7 from the Law of environmental protection, the liability regarding the environment protection incumbs on the central authority for the protection of environment and on its territorial agencies, the central authority for the protection of environment being - in accordance with the art. 87 from the same law – The Ministry of Waters, Forests and Environment Protection, which has in its subordination, at territorial level, the agencies for environment protection. The mentioned Ministry, together with other central and local authorities, acts in the name of the State. The State, through its specialized institutions, ought to ensure the access to information regarding environment quality to all people; the State is compelled to provide legal conditions for the association of natural persons in various organizations for protection of environment quality; the State guarantees, according to fundamental right to petition, that people could address the bodies of executive or law court for environment protection issues; and finally, the State is the one that guarantees the right to damages for the prejudice suffered through pollution. Thus, we have an active subject, the person owning the right to a healthy environment, and a passive subject, the State, which through its various institutions has to ensure conditions for the exercising of the rights of the person. Of course, the owner of the right to a healthy environment is, in the same time, a passive subject in the frame of the environment judicial relation, the protection of the environment being an obligation, among others, for all natural persons, and the State is in this context an active subject, being able to require the persons to comply with the law.

The right to a healthy environment derives from the judicial norm, but it is realized, as we have seen, within the frame of a specific judicial relationship. The respective judicial relationship is concrete even if the right to a healthy environment is not effectively exercised, only that this possibility exists.

This idea could imply that the right to a healthy environment should be examined in the context of the judicial capacity of the person. Through a healthy, unpolluted environment, the recognition and ensuring of that right by the State became more comprehensive, as it is a known fact that, theoretically and practically, the content of the judicial capacity is given by the rights and obligations the person can have. In reality, it is not the judicial capacity that gives birth to certain rights and obligations, since every natural person has the general aptitude of having rights and obligations, in his quality of rightful (de jure) subject, but, – in the legal limits of the judicial capacity – it is the judicial documents and facts which determine the effect of occurrence, modification or extinction of different rights and obligations. The judicial documents and facts can only give birth to the rights recognized by the law. In the case we are examining, the natural persons have had, before too, from their birth, and in certain conditions from their conception, judicial capacity, but from its content, up to its legal consecration, the right to a healthy environment lacked. Indeed, since the
natural person has the judicial capacity, he/she does not appear merely as the bearer of certain concrete rights and obligations in the frame of some judicial relationships; the person only has the aptitude of having rights and obligations, for whose birth it is necessary that a judicial fact (in the broad sense) should occur, what actually happened by the adoption of the Law of environment protection.

As a subjective right, the right to a healthy environment comes to being, after having been consecrated by the law, since the moment when the natural person acquires judicial capacity. From the moment of his birth it can already be exercised; it could not be reasonably stated that a minor under 14 or the forbidden do not have the right to a healthy environment, and that only those with full capacity of exercise and those with restrained capacity of exercise have this right. The law settles no restriction in this regard, this right is not affected by any modality, and hence, from the moment of one’s birth this right can be exercised.

Concerning the guaranties offered by the State for the actual usage of the right to a healthy environment, we have seen them to be expressly foreseen in the art. 5, letters a-e. The first thing guaranteed by the State is the access to the information regarding environment quality.

Knowing for real the quality of environment is one of the essential conditions for the prevention of pollution or for the decreasing of the negative effects it can have on man’s health. In order to freely enjoy the benefits of nature, of natural and artificial environment, in general, man has to make use of his knowledge in view of creating a healthy environment. Protecting and improving the environment for the present and future generations has become a primordial objective; the realization of this task has to be harmonized with the great ideals of mankind: peace, economic progress, social development, realization of an unpolluted environment.

In the frame of the action plan on environment, adopted at the first world Conference on environment held in 1972 at Stockholm, it was recommended to governments to provide every individual with equal possibilities of influencing his own environment, both by means of education and by the free access to the necessary tools and information.

The access to information regarding the quality of environment implies, of course, a caring awareness of the environment with the citizens; it implies that they should be interested in obtaining information on the quality of the environment. For this end, the State will have to settle a program of informing the public aiming at awakening in every individual the awareness of the environment and of the respective problems and the obtaining of collaboration from the public concerning the environment management and protection. Secondly, the State guarantees the right of someone to associate in organization with the aim of defending the quality of the environment.

This warranty is a concretization of the right to associating, stipulated in the art. 37 from the Constitution; citizens can freely associate in non lucrative foundations and organizations, which can aim at attaining such objectives as: rendering more sensible the public opinion with regard to the ecological problem, the realization of the proper ecological education of population, and especially of the young people by audio-visual tools, through conferences, symposiums, ecologic documentary films, through popularization by mass-media in the geographic areas where there are problems with environment pollution, by making the fauna and flora inventory from the national reservations and parks, of polluted and unpolluted zones of landscape interest that are likely to be declared protected areas, by sensitizing the local public opinion and the decision makers regarding the danger of pollution, the forming and enlarging of the scientific database on the problems related to the pollution of environment, the processing, documenting and providing necessary information to decision
makers, engaging the organization in relations with other specialized units and with natural persons for a reciprocally beneficial cooperation in this domain, creating and carrying out propaganda through specific tools, by making films, publications, periodicals, announcements and other measures of the same kind in direct connection with the protection of the environment.

The law guarantees the right of being consulted in view of making decisions regarding the development of environment policies, legislation and norms, the issuing of environment permits and license, including those for the territory and city planning.

It is a very important aspect of the entire activity of environment protection, as the natural persons not only have rights but also obligations: of requesting environmental agreement and/or permit from the authorities; of assisting the persons entitled with the inspection, providing them with their own measurements or other relevant documents; of submitting themselves to the order of temporary or definitive ceasing of activity; of ensuring their own systems of surveillance of the technological installations and processes and so on. In this context, it is normal that every interested person should be consulted and to forward propositions regarding the national or local policies pertaining to environment, to the concrete measures concerning the plans of arranging the territory and the development of city planning. Natural persons can be and ought to be consulted concerning issues of planning the rural or city space, concerning the environment strategy, a policy which is defined in close connection with territory planning. The right to consultation will have to also comprehend the domain of environment legislation, considering the fact that we are in the presence of a phenomenon (pollution), which is of interest for each and every human being, which constitutes a national problem.

A natural warranty of the realization of the right to a healthy environment is contained in the law under the right of addressing, directly or through certain associations the administrative and judicial authorities in view of preventing or in the case of occurrence of a direct or indirect damage.

We deem this provision as a very important one as, in this way the lawgiver recognizes the „full quality” of lawful or rightful subject for the natural person concerning the right to a healthy environment, providing the person with the legal possibility to address, if necessary, the judicial and administrative authorities. The legal active quality allows any natural person to address the administrative authorities in order to prevent an act of pollution and to sue at law for repairing the damage inflicted on the environment through pollution. In the civil (suing) law, the request of summoning in court is being done, as a rule, by the owner of the right, and in the cases stipulated by the law, by the prosecutor or other persons. The right to address the court is guaranteed by the State for the owner of the right to a healthy environment; any natural person owns this right, and so, in any circumstance, one can inform the law-court so that measures should be taken to prevent some prejudices as a result of pollution, or if this has already occurred, to see to it that the damage be repaired. Such legal actions can be taken on behalf of another person, directly by a natural person or indirectly by an association, action, which is justified by the interests of the entire society, of all the owners of the right to a healthy environment.

The law guarantees the right to damages for the prejudice undergone.

Through prejudice, concerning environment, we are to understand the effect quantifiable in cost of the damage on people’s health or on the environment (on goods) caused by polluting agents, by noxious activities or by calamities. The polluting agents can be substances as solid, liquid, gas or vapor substances or under the form of energy (electromagnetic, ionized, thermal, phonic or vibrating radiation) which, introduced in the
In the environment legislation, the liability for the prejudice – in accordance with the art. 80 from the Law no. 137/1995 – has an objective character, independent from the guilt. In the case of more authors causing a prejudice, the liability is solidary. In the case of activities that generate major hazards, the insurance for damage is obligatory.

Guaranteeing the right to damages for the prejudice suffered as a result of pollution is in close connection with the regulations of the art. 998 and the following ones from the Civil Code, on the other hand, objective liability is only the exception, the rule being subjective liability, that is, the one whose fault caused the prejudice is hold responsible.

The recognition by the Law of environment protection no. 137/1995 detailed in the Law no. 26/1996, of the right to a healthy environment and the guaranteeing of this right for all the natural persons means that the parties through their will expressed in a concrete judicial document cannot renounce healthy environment in favour of another; such a judicial act would be contrary to the law, and hence, under absolute nullity. The right to a healthy environment cannot be exercised by no one against the interests of others.

By consecrating in the law the right to a healthy environment, the diverse and complex content of the relations within environment legislation was enriched with an element of a special judicial significance and of a great value for the development of these judicial relations and of this area of the legislation.

We have clarified, at least for ourselves, the debate pertaining to the questions: who is the owner of the right to a healthy environment; if we can discuss about „a right of the individual” or of „a right of the nature” in which, of course, people are understood to be part of.

Even though we might accuse the solution of „human finality” that it is the expression of an anthropocentrism situated in the absolute impossibility of imagining a judicial relationship where man would stand not so much on the start line, as (also) on the finish line, from the law standpoint we have upheld and we do uphold that the owner of the right to a healthy environment can only be man taken individually, as a natural person, who, after gradually becoming aware will finally reach the conclusion that all preventive, defensive, repressive and repairing judicial measures only serve the interests of maintaining life on Earth and the development of environment in which people come to life, live, work, multiply and rest also due to the legislative recognition of the right to a healthy, unpolluted environment.

We conclude with saying that even if from the legislative standpoint Romania almost entirely complies with the European standards, our country does not have the administrative or financial resources that would make their implementation possible. The European reports repeatedly draw attention on this fact and recommend that future endeavors should focus less on the legislative compliance and more on developing the capacity of putting into practice and ensuring the necessary resources for implementation and investments in the domain.

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