

Environmental issues in the legal order of the Czech Republic

Ivana Průchová*

I. INTRODUCTION

Methodologically, it is impossible to find a way of describing and eventually assessing, in the most objective manner, how the Czech legal order reacts to the requirement of „integration“ of the protection of the environment¹.

Any consideration of the issue needs to start from the fact that the *protection of the environment is a worldwide task*. Its *realisation* is accompanied by a *number of problems* of both objective and subjective nature.

The realisation means are of various kinds, while the *law* is undoubtedly *one* of the most important

* Doc. JUDr. Ivana Průchová, CSc., Department of Environmental Law and Land Law Faculty of Law, Masaryk University, Brno

¹ Cf. e.g. KRUŽÍKOVÁ, E. et al.: *Právo životního prostředí Evropských společenství* [The European Communities environmental law], LINDE PRAHA, a.s., 2003, especially p. 38 and following.

ones. This is true for both *international* law as well as the law of the EC (*community law*) and the law of the individual states (*national law*).

The first step, when dealing with trends in environmental issues in the legal order of the Czech Republic in the current European context, is to turn attention to basic issues concerning the legal regulation of social relationships in the area of environmental protection, as well as other notions closely connected with it.

It is not the aim of this study to examine in detail whether environmental law at the above-stated levels (international, community, national) can, in the objective sense of the word, be considered an independent branch of the law. This issue, however, cannot be completely dismissed. Opinions on this issue are, in the case of the Czech Republic, divided². At this point, however, I think it important to draw the readers' attention to the opinion expressed by V. Knapp³, who, as early as a decade ago, included the field of environmental law among the so-called mixed or complex branches of law. Their characteristic feature is the inclusion of elements of various branches of law and also the fact that they may be created ad hoc. The mixed quality is apparent in the use of both public law and private law methods of regulation. In the case of environmental law in the contemporary period of development of social relationships, the public law methods of regulations are significantly predominant. The „ad hoc“ feature may, with respect of the environment or its protection, be perceived in two ways. First, there is the „ad hoc“ principle up to the time when the independent regulation of the object of protection (the social relationships originating in the protection of the environment) loses its justification. In this sense, „ad hoc“ undoubtedly represents the „for eternity“ horizon, i.e. lasting for the whole period of the existence of the Earth and any life on it. Second, „ad hoc“ may be seen from the point of view of the legal system, i.e. lasting for the time of the „need“ to objectively (despite the elements of the mixed character of the method of legal regulation and the possible fragmentary and cross-sectional nature of the legal regulation) respect environmental law as an independent branch of law. *Personally, I think that environmental law represents an independent branch of the Czech legal system.* The definition of the area of the social relationship forming it, however, still presents a major problem, also with regard to the way in which *environmental law* is conceived of in EC law in the objective sense of the word.

II. THE SYSTEM OF EC ENVIRONMENTAL LAW AND ITS RELATION TO CZECH ENVIRONMENTAL LAW

The current EC environmental law⁴ is divided into two areas. The first, so-called „horizontal“, area is represented, above all, by regulations concerning general and common institutes of environmental law (this area primarily includes the assessment of the influence on the environment (SEA, EIA), integrated prevention, reduction of the pollution of the environment (IPPC), marking of products, free access to information on the environment, the system of environmental management and audit (EMAS), the relations to town and country planning, and as a specific area also the problems of standardisation and rationalisation of reports on the implementation of directives related to the environment). The second area, which might be called as „component-source“, is represented by the legal regulation of the protection of the individual components of the environment or the sources and agents that threaten either the individual components, several such components, or the environment as a whole (specifically, this concerns the legal regulation on the protection of the air, water, nature, as well as the legal regulation of the protection against the negative influence of waste materials, industrial waste, and the risks which industrial pollution, chemical agents, genetically modified organisms, and noise may pose for the environment or its components). As regards legal regulation, the area of the „rationalisation of the report on the implementation of directives related to the environment“ does not, in my opinion, present merely „the area of legal regulation of environmental law“, but a general trend with regard to all directives (i.e. other directives in addition to those concerned with the environment) whose content has to be implemented, both at present and in the future, by the member states in their legal systems. This implies that it would certainly be possible to include other specific areas in the field of EC environmental law (such as forest protection, consumer and health protection, public health protection, protection against negative effects in agriculture, ionisation radiation, cultural heritage protection, and internal environment protection). In this respect, one could also look for inspiration at the national level of the individual member states, including the Czech conception of environmental law, and possibly formulate certain conclusions that might influence the community vie-

² Cf. e.g. the individual contributions in *Právo životního prostředí [The environmental law]*, Conference proceedings, MU, Brno, 1995.

³ KNAPP, V.: *Teorie práva [Theory of the law]*, 1st edition, Praha, C.H.Beck 1995, p. 69.

⁴ See KRUŽÍKOVÁ, E., op. cit. in footnote 1, *ibid.*

wpoint on the subject of EC environmental law. The fact that the areas enumerated above are not explicitly included in the field of EC environmental law does not, however, mean that the community law has not dealt with them – quite on the contrary. Without wishing to diminish the significance of the legal regulation of the respective areas, this, however, occurs „outside“ the framework of EC environmental law, e.g. within the framework of consumer protection, public health, agriculture, culture, etc.

With regard to the principle of integration – one of the basic principles of EC environmental law, it needs to be acknowledged that the field of community law is (and will be) marked by a „foray“ of environmental aspects into other legal branches of EU law. The same trend may be expected to exist in the legal systems of individual member states.

From the above-stated, at least four viewpoints follow, under which the so-called environmental issues of the Czech legal order in the European context should be dealt with:

- 1) from the point of view of the object and quality of environmental law of the Czech Republic (environmental issues in the narrow sense of the word),
- 2) from the point of view of integration, i.e. the intersection of environmental elements into all branches of the Czech legal order,
- 3) from the point of view of the relationship of the Czech environmental law to other branches of the Czech legal order, and
- 4) from the point of view of the relations of Czech environmental law and environmental elements of other branches of the Czech legal order towards EC environmental law and environmental elements in other branches of EC law.

III. THE NOTION OF „THE ENVIRONMENT“ AND ITS APPLICATION IN THE CZECH LEGAL ORDER

The „general“⁵ legal definition of the notion of the „environment“ is contained in the Czech legal order under Section 2 of the Act No.17/1992 Coll. on the protection of the environment, as subsequently amended. According to this provision, „*the environment is everything that creates the natural conditions of existence of organisms, including human beings, and is a prerequisite of their further development. It consists, above all, of the air, water, rocks, soil, ecosystems, and energy*“.

This definition has been analysed by numerous authors in the past few years, especially from the theoretical point of view⁶. It can certainly be stated that the definition is rather broad with regard to its interpretation, and thus (when attempting to „grasp“ it), it may be conveniently used in the process of application of those legal provisions containing the notion of „the environment“ but not originally drafted as specifically environmental law regulations. That is the case, for example, with certain articles of the Charter of Fundamental Rights and Freedoms, such as Article 11, Section 3 in connection with the limitation of the ownership right mainly in order to avoid harming the environment, Article 35 Section 1 in connection with the subjective public right to an unharmed environment, Article 34 Section 2 in connection with the right to timely and complete information on the state of the environment, and Article 35 Section 3 prohibiting anyone to endanger and damage the environment.

Additional examples may be found in connection with legal liability and the prevention of damage in Section 45 of the Act No. 200/1990 Coll. on administrative infractions, as subsequently amended, which regulates administrative infractions in the area of environment protection. Still other examples occur, for instance, in Sections 181(a) and 181(b) of the Act No.140/1961 Coll. – the Criminal Code, as subsequently amended, which deal with the „general“ elements of the crimes of endangering and damaging the environment (i.e. intent and negligence), and in Section 415 of the Act No. 40/1964 Coll. – the Civil Code, urging people to act without causing any harm to the environment.

Other areas of law contain similar references to the environment. Thus, in connection with „unfair competition“, Sections 44(2) and 52 of the Act No. 513/1991 Coll. – the Commercial Code, as subsequently amended, are exceptionally included (i.e. in relation to the private law aspects of environment protection), providing that endangering the environment constitutes behaviour classifiable as unfair competition. There are also regulations concerning the Real Estate Registry as a state-operated information system on real estate which, in Section 1(3) of the Act No. 344/1992 Coll. on Real Estate Registry, as subsequently amended, provide that the registry is a source of information which may also serve the purpose of „the protection of the environment“. Another important regard for the environment can be perceived in the current wording of the Act No. 5/1976 Coll. on Town Planning and Construction Guidelines. When defining the aims and tasks of town planning, it specifically states that town planning forms the prerequisite for ensuring a lasting

⁵ See e.g. KINDL, M., DAVID, O.: Úvod do práva životního prostředí – soukromoprávní aspekty ochrany životního prostředí [Introduction into the environmental law – private law aspects of environmental protection], vydavatelství a nakladatelství Aleš Čeněk, s.r.o., Plzeň, 2005, p. 1

⁶ E.g. textbook-like publications of the individual Czech faculties of law

harmony between the natural, cultural, and civilisation values in a given area, especially with regard to care for the environment. To give one last example – the new Construction Act No. 183/2006 Coll., effective from July 1st 2007, expressly uses the term „environment“ and refers to environmental regards in an even more intense way, both from the quantitative and qualitative points of view.

Numerous other sections of various acts might be provided here, but it is apparent from the above-mentioned examples that the Czech legal system has recently been paying an increasing attention to environmental issues. However, the question remains to what extent the principle of integration is being observed.

IV. A NOTE ON THE RELATIONSHIP OF THE OBJECT OF ENVIRONMENTAL LAW AND THE PROBLEMS OF ENVIRONMENTAL ISSUES IN THE CZECH LEGAL SYSTEM

The concept of „the environment“, as defined in Section 2 of the amended Act No. 17/1992 Coll. on the environment, makes it possible, in my opinion, to approach the issue of the legal regulation of environmental law in various ways, both as regards the „objects and areas“ of the protection of the environment and its actual means. To be more specific, there are certain differences between the „Prague“ approach and the „Brno“ approach to the subject (and thus also the system) of environmental law, namely the reliance of the „Brno school“ on a broader conception. We could also draw attention to the contribution of the „Pilsen school“, which has practically been the first one in the Czech Republic to systematically deal with the private-law aspects of the protection of the environment, namely with the emphasis on civil law institutes. Its complex approach should, in my opinion, be complemented with other private-law aspects, namely those from the area of commercial law. In any case, none of the differing approaches corresponds fully with the definition of environmental law within the EC. As regards the complexity of dealing with the legal regulation of social relations relating to the protection of the environment, the „Brno school“ is really the most advanced one. If the rationalisation and system measures with respect to the protection of the environment were taken for the entire Czech legal system in such a way that the provisions of both purely environmental and other legal regulations containing provisions or legal norms with an impact on the environment were not doubled and contradictory, then one could, in my opinion, confirm the existence of a trend to approach environmental law in the broadest or most complex way possible. In other words – this is the trend (though not without its faults) asserted by the „Brno school“. In principle, it would be optimal to regard Czech

environmental law as an area of social relation regulated by law, regardless of whether the particular legal norms are to be found among those considered as sources of the „traditional“ branches of public and private law, or whether they are to be found only in those legal norms which have been generally considered as sources of environmental law.

V. ESSENTIAL PREREQUISITES FOR THE RATIONAL INCLUSION OF ENVIRONMENTAL ISSUES IN THE CZECH LEGAL ORDER WITHIN THE EUROPEAN CONTEXT

The answer to what forms the basic prerequisites for the rational inclusion of environmental issues into the legal order within the European context may seem to be quite simple: namely to formulate the national, i.e. Czech, legal norms according to the requirements of European environmental policy. However, bearing in mind that one of the essential principles in the area of the protection of the environment (i.e. also EC environmental law as well as other areas of community law) is the *principle of subsidiarity*, it is necessary to approach the determination of the scope available for possible national (i.e. Czech) specifics of the legal regulation of social relations related to the environment protection in a more general way.

From the factual point of view, this means to decide on the „structure and nature“ of the fundamental national sources of environmental law. In other words, to see whether or not the quality and mutual relationship of environmental legal norms are, after the rather hectic period of development in the area of environmental law (from the accession of the Czech Republic to the EU until the present), such that it is no longer necessary to change anything about the legislative steps taken so far. A part of this problem is undoubtedly contained in the answer to the question as to whether it is suitable, or needed, given the conditions of the Czech Republic, to continue the elaboration of the factual draft of the proposed Act on the Environment as a general „code“ that would regulate general institutes and tools for the protection of the environment. I consider it important to emphasize that those institutes and tools which, by their nature, clearly belong to other „code“ regulations (especially the Civil Code, the Penal Commercial Code, the area of general norms of administratively legal punishment etc.) would have to be excluded from such a code. The ambition of the adherents of the „environmental code“ in the Czech Republic is not (and, as far as I know, it has never been) to create a legal regulation that would disregard the function of other „traditional“ legal norms as the sources of environmental law.

It is also necessary to emphasize that the Czech Republic (as well as other member states) is not obli-

ged to adopt a legal regulation in the form of a code in order to comply with the aims in the area of environmental protection. However, the existence of environmental acts (with different levels of complexity) can be encountered in foreign legislature.

Personally, I think that in the situation when the Environment Act (Act No. 17/1992 Coll., on the environment, as subsequently amended) has been a part of the Czech legal order for almost 15 years, it is not a pertinent question to ask whether to have an independent „general environmental law“ or not, but rather „what“ should be included in the object of its legal regulation and „when“ it would be best to accept it.

The basis for the drafting of the possible new environmental act should be the submitted proposal of the intended environmental act⁷, especially its general part, which should be elaborated not only in coordination with the legislative work on other environmental norms (which the Czech Republic is obliged to adopt in connection with the implementation of the current wording of EC directives or as a consequence of the results of the decision-making activity of the European Court of Justice), but also with legislative work on other legal norms from other branches of the law.

In my opinion, the situation has ripened to the point when it does not seem suitable to include the „new“ institutes and tools of an environmental character in the legal system of the Czech Republic by „enlargement“, i.e. by amending the Act No. 17/1992 Coll. on the environment. I express this opinion in spite of the fact that I was in favour of this procedure only two years ago, especially in connection with the need for legal regulation of the liability for damage to the environment in the Czech legal order by amending the then provisions on the liability for harm to the environment⁸. With regard to the fact that the Environment Act has not been directly amended in the „positive“ sense of the word, it seems that a better way of dealing with the new „general“ environmental problems may be by issuing independent legal norms. However, I think that the focus of attention should lie in the general part, namely that the act (code) on the environment should regulate social relationships connected with general notions, principles, implications, and institutes in the area of environmental protection. The special regimes of the protection of the elements and sources, as well as regimes of protection from adverse effects of substances, phenomena, and specific activities, should, in my opinion, remain within the legal regulation of special legal norms, which, however, should in the „general“ principles fully correspond to

the general environmental act (code). At this point (or in the first phase of the preparation of the draft of the environment act), I see as the least suitable alternative the situation where some areas of the so-called special part are regulated „within the framework“ of the general environment act (code) while others stay „outside“ the scope of legal regulation. I think the solution offered above is sufficiently pragmatic because it takes into consideration the necessity of more frequent amendments in the areas regulated in the special part. And if the environment act (code) was to become a part of the legal order of the Czech Republic, it should be the first relatively stable and unchangeable legal norm.

With regard to the existing situation regarding the quantity and quality of the legal norms regulating the social relationship in the area of the environment, I think that a compromise solution serving as a possible prerequisite for the effective inclusion of environmental issues into the Czech legal order should respect the following:

- a) where the sources of EC environmental law impose the obligation of implementation, this should be done without any undue delay, while respecting the linguistic and other specificities of the creation of legal norms in the Czech Republic, by means of
 - aa) amendments of the already existing norms for the protection of the environment;
 - ab) creation of new environment protection norms while bearing in mind that they might eventually become a part of the „environment code“;
- b) as a consequence to the application activity of the domestic courts, or of the European Court of Justice, any unsuitable domestic norms for the protection of the environment should be amended,
- c) when creating legal norms in which the object of the legal regulation is primarily the regulation of other than environmental social relationships, the tools for the protection of the environment should be included in a suitable way, while the explanatory notes to these acts should specify
 - ca) whether it is the final solution (or inclusion), or
 - cb) whether it is assumed that the content should (might) eventually become an object

⁷ Kodex životního prostředí – zdroj polemik a nadějí aneb návrh věcného záměru zákona o životním prostředí s polemickým komentářem Evy Kružíkové a Petra Petržílky [The environmental code – the source of polemics and hopes, or the proposal of an intended act with a polemic commentary by Eva Kružíková and Petr Petržílek], MŽP 2005.

⁸ PRŮCHOVÁ, I.: Environmentalizace českého právního řádu – vývoj, současnost a perspektivy [Environmental Issues in the Czech legal order – development, contemporary state, and perspectives], in Sborník Aktuální otázky práva životního prostředí, Brno, MU, 2005, p. 9 and following.

of legal regulation of the „general environmental code“

- d) to continue the work on the environmental act (code) with the emphasis on the legal regulation of general notions, means, and institutes of the protection of the environment.

In my opinion, the above-stated steps respect the principle of integration emphasised in the introduction in the sense that it is necessary that the legal regulation of the social relations in the area of environment protection should not be isolated; on the contrary, they should also be incorporated, where suitable and possible, into the legal norms primarily regulating other social relations. In this sense, I consider it important to emphasize that with this requirement in mind, it would not be wise to include environmental issues in these legal norms by means of „special“ legal norms adopted at all costs.

Even in connection with the protection of the environment it holds that it can, in practice, be secured also by the application and interpretation of „generally“ sounding formulations. This statement may be demonstrated e.g. in the wording of Section 420(a), subsection 2(b) of the Civil Code, which regulates the objective liability for harm done by the operational activity with „physical, chemical, or biological effects of the

operation on the surroundings“. In the diction of the law, the notion of „the environment“ is not used at all. However, nobody would probably hesitate to subsume „the environment“ under the meaning of the notion „surroundings“ (cf. the notes on the legal definition mentioned in Section III above).

CONCLUSION

From the above stated, it follows that the process of inclusion of environmental issues into the Czech legal system is already being gradually realised. However, the first period of the membership of the Czech Republic in EU is mostly marked by the mechanical overtaking of the content of the sources of EC environmental law. The above stated conclusions present an individual and partial view on the possible access to the legislative steps with the aim to create effective environmental legislature. The scope and demand of the task of *complex* elaboration of the environmental trends of the Czech legal order in the European context, however, requires the participation of representatives from the area of the environmental law and from all branches of the Czech legal system, as well as representatives of European and international public law.