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THE RIGHT TO CLEAN AIR - THE SCOPE, MEANS AND EFFICIENCY OF ITS PROTECTION

SUMMARY

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SUMMARY

Therein is the tragedy. Each man is locked into a system that compels him to increase his herd without limit - in a world that is limited. Ruin is the destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons.
~ G. Hardin

1. OVERVIEW

The above quote by G. Hardin is the starting point to this thesis. While he referred specifically to the fate of common pastures (owned by anyone and cared for by no one) his seminal work served to propagate the concept of so called "tragedy of the commons". This notion refers to a situation, in which individual users have open access to a resource (unrestricted by shared social structures or formal rules that govern access and use) then use the resource independently according to their own self-interest and thus cause depletion or deterioration of the resource through users' uncoordinated actions, which are undertaken without taking into the account the common good and scarcity of the resource.

This thesis addresses one such resource of vital importance and the potential tragedy of common that this resource is facing.

The present thesis aims at addressing two main issues. Firstly, whether in the Polish legal system there exists such a right as the right to clean air (that is free from dangerous of harmful chemicals), and if so, what is its content and in which legal disciplines can this right be identified as binding. It is the author's assumption and therefore, first hypothesis that such a right does indeed exist under the Polish law, although not as homogenous legal category and source of entitlement. Rather author posits that this right does adopt various forms depending on the analysed legal branch and offers accordingly differing rights to an individual.

Having assumed the abovementioned statement, the author poses the second main question of this thesis, that is to say whether the Polish law, taking into account its content (so called "*law on the books*") and its application (so called "*law in action*") can be described as efficient. The hypothesis there is that, regrettably, the Polish cannot be so characterized, or in other words that while the Polish law technically grants the right to clean air, it at the same time offers sorely lacking instruments to preserve it.

2. METHODOLOGY

This dissertation offers comprehensive overview of the main instruments under the Polish law, which may potentially be suitable to preserve the right to clean air. One by one, the author analyses available instruments from standpoints of respective legal domains: the constitutional law, the international law (being an integral part of the Polish legal system), the European law, the civil law, the criminal law and lastly – administrative law. Each of these domains require employment of formal-dogmatic research method with taking into account idiosyncrasies of each domain.

While the formal-dogmatic approach is the prevalent one, the dissertation employs other methodological method, among which the most important is the economical law analysis . Its methodology along with its unique framework allows to assess the efficiency of legal protection of clean air in a manner more organised and scientific than offered by traditional formal-dogmatic method. Because of that, the author relies heavily on economic law analysis concepts, such as concepts of efficiency, effectiveness and their measurement methods. Having combined those methods with concepts of welfare economics, author puts forward a model that helps to assess whether a given norm or a collection thereof is efficient.

Complementary to the abovementioned methods, author employs in his analysis legal comparative analysis (although sparingly, given the volume of the Polish bodies of law), historic analysis and finally draws on other scientific methods (especially when examining the external costs of persisting pollution in the atmosphere.

3. CHAPTERS OVERVIEW

a. CHAPTER 1

The purpose of the first chapter is firstly to delimit the scope of the thesis' interests, then to clarify the notions and thirdly to explain certain presumptions and caveats.

Firstly, the author expands upon the notion of private and public subjective rights, in order to examine what are the prerequisites to perceive various rights and obligation concerning clean air as subjective rights (private or public).

Then the author defines the notions key to this dissertation, that is to say the environment, the atmosphere, smog, emissions, air pollution and externalities. It is showed how widespread this issue is spread in comparison to other States, and how much the persisting air

pollution negatively impacts human health (among others the respiratory system, circulatory systems and the psyche).

Going forwards, the dissertation revolves around the notions of efficiency and effectiveness of law and how one might measure them. From these considerations, there arises the conclusion that law that is efficient is such to dictate actions which will generate the most net welfare while securing its relatively equal distribution. The law is effective, if it brings forth these efficient solutions. On that basis, a model is constructed which serves to assess whether law (specifically environmental law) is efficient. It is assumed, in short, that efficient law should aim at preventing air pollution externalities from arising as long as cost of the preventions along with alternative costs does not exceed the harm caused. Having assumed that, the effective law should serve to reduce the harm caused as quickly and as comprehensively as possible.

b. CHAPTER 2

The second chapter is devoted to the protection of clean air as provided by the constitutional law and international law.

Firstly it is established where in the Polish Constitution there are mentions of the environment and what legal weight they have. As regards this aspect, while the Constitution addresses the environment on multiple occasions it either does so in order to accentuate that environment has to be taken into account while making policy decisions or obligates the State (in rather vague terms) to preserve and protect the environment for the sake of both the current as well as future generations. These direct mentions of the environment cannot be construed as granting to an individual subjective constitutional right to clean environment (including clean air).

However, the above does not mean, that the right to certain quality of the environment does not arise indirectly from a different, established right. There is a strong case to be made that this indeed is the case, since article 68 of the Constitution grants the subjective right to health (including freedom from negative impact of environmental deterioration).

The current legal status of the right to clean air, that is as derivative right seems not to be adequately efficient. Firstly, if it were recognised as a individual subjective right it would be easier to secure its proper protection. Secondly, irrespective of the lack of its autonomous status the Constitution fails to expressly provide any regulations which would obligate the State (or provide the individuals with the right) to assure that minimal harm comes to people through exposure to toxins in the atmosphere.

Next the author moves to analyse the international law – first global and secondly regional. As it comes to the global international law, this chapter gives the overview of all source and authorities, from which it follows that the decision makers in the international law have not so far recognised the right to clean air in any form (either treaty of through custom). The author makes an attempt to assess this state of affairs as well as explain possible reasons which have led It has to be noted that not unlike in the case of Constitutional law, the right to clean air may be derived from other humans rights (predominantly right to health). The regional international legal system of Europe (i.e. enshrined in the ECHR) is to some extent analogous in this respect. However, ECHR as interpreted by the European Court of Human Rights provides much clearer obligations resting upon the Contracting Parties, thus making the right to clean air relatively well established, even though it arises (depending on the context) from the right to property, right to health and right to privacy).

As with the Constitution, one might criticise the international law (both in its global and regional form) for not striving to enshrine any obligations towards protection of the environment in form of rules, which makes interpretation of the norms aiming to protect clean air shaky and of unpredictable content.

c. CHAPTER 3

The third chapter is devoted to the European law regulations that guarantee protection of clean air.

Firstly it is established where in the European legal system there are mentions of the environment and what legal weight they have. First and foremost the protection of the environment (including the atmosphere) is enshrined in the Treaties, the Charter of Human Rights as well as in the Charter of Human Rights. There the European lawgiver established certain core principles which govern (or should govern) EU environmental policies. These include principles of sustainable development, of prevention, of bearing the costs of pollution by the polluter, of precaution, of best available technology, which have been dynamically interpreted by the ECJ, which helps to decode the content of those principles, which – when taking into the account the ECJ stance – is quite different from what would follow from purely literal interpretation of those principles.

All these rules serve as guidelines for establishing more specific policies aimed at protection and amelioration of environment, including the atmosphere. The author presents the main secondary legislation acts which tackle the problems of clean air, most notably the so

called CAFE Directive, which sets limits of certain toxins' concentration in the air. These limits have since been transposed into national legislation and have been subject of ECJ rulings, including one which concerned Polish efforts (or lack thereof) aiming at ensuring that the limits set forth by the Directive are not exceeded. The author contends, as is clear from the ECJ's jurisprudence, that this obligation imposed on the Member States is such, that inability to ensure certain levels of concentration of harmful chemicals automatically constitutes a breach of these provisions which set forth the limits.

The author notes that the ECJ has a very interesting tendency to interpret various secondary legislation norms such as the one mentioned above, as giving actual rights to the individuals. This means that ECJ ascribed to those norms have so called direct effect, that is to say they generate a specific right on the part of private parties to demand certain actions from the Member State.

These developments indicate that in the European law one can easily identify the right to clean air which encompasses all the individuals' right granted by specific secondary legislations' measures, interpreted as required by the core principles of environmental policies. The right is as efficient as it is possible under specific legal conditions typical of the European law. By that it is meant that within its competence the European has to be viewed as efficient (especially when considering ECJ tendency to ensure the so called *effet utile* of the European law. The inefficiencies arises, where the EU powers are limited. Case in point, the EU itself considers its law as inefficient insofar as it does not allow to closely examine whether the Member States have adopted air protection plans and then followed through with their implementation.

d. CHAPTER 4

The fourth chapter is devoted to the civil law regulations that may be invoked in order protect one's rights to clean air.

The civil law is by definition the part of legal system which aims to protect individuals from actions of other individuals. Thus, theoretically civil legal instruments can and should be considered as sources of protection of the right to clean air.

The author considers many regulations which could be taken into account in this regard. They include the nuisance law, proprietary claims (which can be used to demand that another actor does not interfere with the enjoyment of one's property), tort law, regulations regarding protection of personal goods (in this regard the author expounds upon controversy, whether

there exists a personal good – right to clean air), preventive claims and specific civil claims provided by the Law of Environment Act.

Each instrument offers slightly different level of protection and requires different set of conditions to be met. However, one constant among them is that they all require to establish two sets of facts – first the identity of the polluter and secondly the more or less exact measure of one's harm. In a typical situation, when one faces air pollution, there are countless polluters and possibly unforeseeable consequences to exposure to the pollution. Thus, apart form extreme situation a private party may face insurmountable difficulties when trying to forward their claims.

One alternative to using these claims against the polluters is to sue the State instead, for not providing adequate protection of clean air, at least as required by those regulations which are the transpositions of the CAFE directive. This solution is certainly more feasible, although it presents a separate host of problems. To successfully win a case against the State in such a scenario, one has to meet certain evidentiary conditions, including proving the extent of the harm done. Thus, although possible, this solution is by no means effective, and certainly not in such a way to ensure any large-scale effects.

Thus the civil law regulations seems inefficient and inadequate as means to protect one's right to clean air. It has to be noted that from the economic law analysis it follows that general and widespread social issues are not efficiently solved through civil law. It should however be a viable alternative, if a private party decides to seek relief through civil law. In order to achieve this goal, the Polish legislator should adopt certain changes when it comes to evidentiary obligations of the injured party. One example to be followed, perhaps unexpectedly, may be found in the Chinese legislation, which tackles the evidentiary issues quite aptly, and whose legal system had overall more success in bringing about decrease of air pollution.

e. CHAPTER 5

The fifth chapter is devoted to the protection of clean air as provided by the criminal law.

Criminal law seems like natural choice to employ in order to prevent the society from generating harm to the common goods, such as the environment. In theory, the Criminal Code penalises polluting of all parts of the environment in such a way, that endangers human life or health or degrades the atmosphere in considerable ways. There is also provision that prohibits improper handling of waste, which could bring about the same consequences as

abovementioned. However, these provisions are used extremely rarely, and virtually never in cases of "common" private polluting of air, even though legally there are no reasons not to persecute such polluting, especially if it arises on the continual basis.

Similarly underused are other provisions which make it a misdemeanour to improperly handle the waste and to breach the local provisions governing the use of certain fuels and certain installation which give off emissions.

These facts make the penal provisions of the Polish law inefficient, and curiously not because of their inherent flaws but because of their inadequate implementation. Author tries to assess the provisions more formally – using Gary Becker's model of crime. From his model there follows that efficiency is the resultant of the severity of crimes, and the probability of their detection. The practice of implementing Polish penal regulations demonstrates that both these aspects are underperforming, which results – not unexpectedly – in a inefficiently functioning system of protection of right to clean air through this particular domain of law. The statement is even more true, when one considers positive example of Cracow, which increased the probability of detection of all acts directed against the atmosphere. The results were quite remarkable, as there was a considerable decrease in the Cracow's air pollution levels.

f. CHAPTER 6

The sixth chapter is devoted to the protection of clean air as provided by the administrative law. This domain of law provides arguably the widest variety of instruments which serve to protect the right to clean air.

These instruments can be categorized into three groups. Firstly the repressive ones which include all means of regulation and control, of how private parties use the air (or more precisely how much chemicals they emit into the atmosphere). The most regulations of this kind can be found in the Environment Protection act. There the legislator determined what kinds of emissions and installations require permits or payment of certain tariffs. An interesting branch of repressive regulations are those that are set forward locally by voivodships' councils, which may altogether preclude use of certain installations or fuels. A case in point is the resolution adopted by the Council of Lesser Poland, which prohibited the use of all solid fuels during the heating season. The repressive instruments, given their great flexibility and ability to determine precise conditions of the allowed emissions demonstrate that these regulations should form the core of the Polish clean air protections norms. Additionally, an analysis of these regulation shows that the administrative law does recognise the right to clean air, as it grants to

parties affected by the regulated emissions to take part in the decision-making process regarding e.g. issuing permits to emit certain chemicals.

The second group of instruments, equally important although less numerous, are those regulations which aim at incentivizing private parties in investing in more eco-friendly solutions (that is solutions which limit the emissions of pollution into atmosphere, such as replacing the heating sources or performing thermomodernisation). Here the Polish legislator employed traditional strategies such as fiscal incentives and subsidies. However the Clean Air Programme represents a more original approrach. Technically, it does not form part of administrative law, as it functions more on the basis of an agreement concluded by two equivalent parties – the State which offers financing and a party which agrees to use the financing for specific purpose. In general the premise behind the Programme is a sound and promising one. However, certain technical aspects in introducing its implementation hindered its envisaged yearly progress and as of this moment it is difficult to assess its vialibity.

The first two groups of regulations concern the prevention of air pollution, while the third group concentrates on restoration of status quo and on awarding damages if the restoration turns out to beimpossible. These serve as interesting, more viable alternative to the the civil instruments, which also grant the possibility to seek damages.

4. CONCLUSIONS.

The conducted analysis yielded two main conclusions. Firstly, that there exist rights to clean air, one specific to every domain of law, that has been discussed. When it comes to the assessment of their efficiency, the answer is less straightforward. The author identified these domains, which prove inefficient in protecting the right to clean air (the constitutional law, the civil law, the international global law) and pinpointed the sources of these inefficiencies – mostly they concerned inadequate legal regulations. The author also listed those domains which seems to be efficient in the sense that they can, if properly implemented, serve to prevent illegal emissions from occurring and to make sure that the eventual losses the emissions generate are indemnified. These are the regional European international law (notably the EHCR), the penal law and the administrative law. Thus the issue of their effectiveness does not inherently lie in the quality of legal framework but rather in the inefficient ways, in which the regulations are employed.

In summary it has to be said that there should occur the strengthening of the right to clean air within the domains of constitutional and global international law. These developments

should coincide with concerted efforts to properly coordinate fully utilizing the penal and administrative regulations that are in force. Also environmental damages and indemnification thereof within the civil law should be comprehensively regulated, so that whenever administrative and penal law do not allow for a remedy, a civil party may seek damages on their own.

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