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Jagiellonian University in Cracow

ENVIRONMENTAL PROTECTION. SOME PHILOSOPHICAL AND CONSTITUTIONAL QUESTIONS

One may more and more clearly notice a division in contemporary philosophy and theory of law where the traditional anthropocentric model is contrasted with the eco-centric one. An important issue for the requirements of this paper is the reflection on the genesis and essence of both trends. It seems that only in this way it is possible to positively interpret the constitutional premises of issues connected with environmental protection and the problems resulting from it. The forthcoming short historical and philosophical reflection constitutes not only an introduction to further considerations but is also more significant, as the currently ongoing discussion concentrates on the pragmatic and instrumental aspect of environmental protection and does not sufficiently stress the ethical dimension of the issue. The lack of a philosophical and historical analysis of the problem may be the reason for ambiguities, which cause most disputes that are apparent nowadays. Numerous problems result from mixing the argumentation of the anthropocentric and eco-centric models.

It seems indisputable that for the Judeo-Christian culture circle, the paradigm of thinking is the anthropocentric model. The above thesis is justified in the context of the role played by the Biblical text of the Exodus and its influence on philosophical thinking of the culture circle in question. It points at man as a being formed to reflect God and ordered by the Creator to populate Earth and make it serve him[*]. The great philosophers of Christianity as St. Augustine and St. Thomas of Aquinas spoke in this way. At present the Catholic Church conforms to this standpoint and the evidence for this may be the encyclicals *Humanae vitae* of Paul IV and *Redemptor hominis* of John Paul II. Furthermore, the anthropocentric model of nature is also characteristic for contemporary ethics, and its essence is best expressed by the order formulated by I. Kant in the thesis that man is obliged to desist from cruelty to animals – as in this case – it is a duty that he has with regard to himself. This extremely anthropocentric standpoint was also characteristic of Marxist philosophy, which especially in the fifties of the 20th century propagated ideas of unrestricted transformation in nature and the thesis that along with the development of productivity the dependency of society on natural factors diminishes.

In conclusion, one may state that from the anthropocentric point of view, environmental protection is not treated as a target itself but as a means to reach the target of protecting man, his life, health, comfort or a possibility of ethical or aesthetic experience[**].

Things are different in the case of the eco-centric or in other words, the ecological model. The eco-centric trend is quite a new one in philosophy and broadly understood ethics however one may reasonably totle. Although Ulpian extended thargue that it is not too farfetched to search for its roots in the philosophy of the stoics, Socrates or Arise understanding of nature by adding the animal kingdom, the completely modern character is held by the views of equal rights of living creatures or in the laws of inanimate matter, which are so characteristic of ecology. Ecological movements dealing with links between nature and man, with particular attention paid to the outlook aspect, did not – as a matter of fact – work out a uniform programme[***]. The consequence of this state is the lack of answer to the question, what is natural environment, what phenomena should be protected and under what conditions one may introduce their legal protection. It is a fact that the consumptive way of treating the world and the associated problems of industrial surplus and

[*] The Exodus 1.28.

[**] See: W. Radecki "Ochrona środowiska naturalnego a ochrona dóbr osobistych" (the Protection of the natural environment and the protection of personal interests and belongings) in Dobra osobiste i ich ochrona w polskim prawie cywilnym (Personal interests and their protection in Polish civil law), Ossolineum 1986.

[***] A. Kaufmann: "Czy istnieją prawa natury" (Are there any laws of nature) translation J. Stelmach in Logos i Etos 1/1993, p. 24 and nn.

maximisation of unit profit at the expense of the whole ecosystem have placed contemporary society before the question of further existence. One has to think whether it is possible to solve the problem by referring to the universal laws of nature, governing the natural environment of living beings and themselves, what is postulated by ecologically oriented philosophy. It is rightly noticed, that the laws of nature, which receive an empirical, descriptive sense may also have a normative dimension and by this constitute a basis to formulate directives for proper performance, both legal and moral[*]. Although it is difficult to imagine axiologically neutral ecological ethics, one may easily imagine that contemporary philosophy stands before the problem of redefining the role of man and his relation with regard to nature. In legal and natural concepts nature is rather a basis for legitimising the fact of being bound by law than the object of protection[**]. Such a thesis immediately provokes a question on the status of nature – that is whether nature is only an empirical phenomenon, a moral one or may be it is a normative fact.

If treating the issue of the natural environment or more broadly – nature according to axiological categories, one has to see it already on the level of general typology of value. From this perspective the eco-cetric model, contrary to anthropocentric one, has to deal whith difficulties concerning relation between the value of nature and the value of human life. From this point of view the problem is crucial because either in the subjective and objective concepts in ethics it may result with subordination of the value of human life to the value of nature, and more exactly to the value of nature environment. More over an extreme eco-centric approach excludes possibility of any workable definition of nature, because each definition a priori has to adopt the anthropocentric point of view. It is so because each definition indirectly determines the scope of its objects. Thus from the pure eco-centric perspective the nature has to be an indefinable phenomenon, the essence of which weunderstend in an intuitive way.

One does not need to adopt eco-centric approach to admit that the nature is a value and it is clear that in its characteristics – depending on the reference point – one may find hedonistic, vital, spiritual and religious aspects[***]. Should we follow the emotional apriorism of Max Scheler and accept the objectivity of understanding values and their hierarchy, it will be easy to notice that also the value of the nature understood both, as a personal, social and all human value is a peculiar moral phenomenon. Such a thesis would additionally find justification if we included the existential dimension of the natural environment, determining the existence of man as well as his ornamental dimension, i.e. determining the beauty of human life[****]. However only form anthropocentric point of view we can overcome the ambiguity of the concept of " value" both in its subjective and objective understanding in the processes of creating and applying law. It is so because the concept of value in contemporary social sciences is nearly always defined or described with reference to assessment or treated directly according to sociological categories[*****]. Without any concrete definition of nature environment it seems to be impossible to create in reality completely and axiologically coherent system of environmental protection in positive law.

One can ask why we have to definite nature and thus limit in one way or another this phenomenon. Many of ecologists believe that value of nature or environment is universal thus commonly shared. If it is really so, there should be no

terminological ambiguities. The historical development of the natural law doctrine shows us something different. The dominant – in the Antiquity, the Middle Ages and the beginning of the contemporary era – substantial and non-historic expression of the law of nature, was gradually displaced by procedural understanding pertaining to rational criteria[******]. The practical consequence of the above stated problems is that eco-centric attitude is not adequate and useful to the legislators and lawyer. I would even argue that the positive law a priori presuppose anthropocentric model of nature. It seems that from the legal point of view, the only paradigm to be sus-

[*] J. Stelmach and R. Sarkowicz: "Teoria prawa" (Theory of Law), Wydawnictwo Uniwersytetu Jagiellońskiego, Krakow 1996, p. 185.

[**] A. Kaufmann "Czy istnieją..." op. Cit. p. 27.

[***] W. Tatarkiewicz: "Historia Filozofii" (The history of Philosophy) PWN, Warsaw 1978, volume III p. 221.

[****] See J. Lipiec: "W przestrzeni wartości. Studia ontologii wartości" (In the dimension of value. Studies on the ontology of values), Harcerska Oficyna Wydawnicza, Krakow 1992, p. 29 and nn.

[*****] More on this P. Winczorek: "Konstytucja i wartości" (The constitution and values) in "Charakterystyka i struktura norm konstytucji" (The characteristics and structure of constitutional norms), Wydawnictwo Sejmowe, Warsaw 1997, p. 44 and nn. The issue of theory of value was described more profoundly in the paper of G. Klos in "Pojęcia, teorie i badania wartości w naukach społecznych" (The Concepts, theories and research of values in social sciences), PWN, Warsaw 1982.

[******] A. Kaufmann "Czy istnieją..." op. cit., p. 27.

tained is the anthropocentric attitude to the natural environment. Therefore, the praxeological, economic and political issues connected with the matter of nature environment will still be more important for organs creating and applying

Only from anthropocentric point of view the concept of nature and thus the natural environment may gain a purely projective, dogmatic character of a very empirical overtone. In this way, the legal protection will apply to this fragment of nature – understood in any way – as defined by the legislator. Moreover when analysing the problem of natural environment from such a perspective we do not exclude the question whether and how should its value be protected.

ANVIRONMENTAL PROTECTION AS A CONSTITUTIONAL MATTER

As it has already been stated, the value of the natural environment has a personal, social and human dimension. It seems justified to ask the question on a possibility of constructing man's right to the natural environment. The issue is very current indeed as the right to the environment is the object of a growing number of international declarations and pacts such as the Declaration of Basic Rights and Freedom of the European Parliament dated 12th April 1989 or the 11th Additional Protocol pertaining to Economic, Social and Cultural Rights to the American Convention of Human Rights in San Salvador. Man's right to the natural environment does not need to have the status of a new spontaneous law of the 3rd generation of human rights but on the contrary, one may argument, that this right results directly from the regulations of positive law guaranteeing the right to life and privacy[*]. It is important to stress, that the construction of man's right to the natural environment is an expression of accepting the anthropocentric point of view itself. Without going into the details of accepting this concept in international law, it is worth noticing that the issue of man's right to the environment may be constructed both on a constitutional level and that of standard legislation.

Theoretically, the constitutional "rationing" of right to the environment may have three forms. First, the constitution may proclaim it directly. Second, the constitution may recognise the regulations aimed at protecting the environment as a guarantee of different rights, e.g. the right to live or to health care protection. The third possibility is a situation where although the constitution does neither proclaim the right to the environment directly nor indirectly, the doctrine tries to derive them from other constitutional rights[**]. In such a situation one has to ask the question on the role to be played by constitutionalisation of the right to the natural environment, particularly about its target, especially that the formulation of the right to the environment in the constitution does not determine whether and in what way it will be asserted[***].

However, the literature correctly states that the constitution may be treated not only as an element of the legal system. The constitution fulfils a number of political system functions as shown best in theories of the social contract, indicating principles accepted by all rational and reasonable people. Should we simplify things and accept that in a democratic state the constitution fulfils the function of a social contract, apart from the stabilising one consisting in defining a legally binding vision of a state, and dynamic one related to determination of its targels[****].

From the theoretical and legal point of view, accepting the dynamic role of the constitution brings about certain difficulties in defining its normative status as a source of law. Therefore, in order for the value of the natural environment to be able to take advantage of constitutional protection, it is necessary to keep a balance between the normative and programme elements. Should the issue of the natural environment be depicted in the constitution only through programme norms, then on the basis of the positivistic concept of law, it will be difficult to construct a right of man to the environment. It is so because. The constitutional protection of the natural environment is directly connected with the problem of the normative status of its regulations.

The doctrine includes a standpoint, that each element of the constitution is normative in character as

[*] J. Menkes "Prawo do środowiska jako prawo człowieka" (The right to the environment as the right of man) in "Ekologia i prawo" TBKUL, Lublin 1999 p. 44.

[**] W. Radecki: "Ochrona środowiska naturalnego a ochrona dóbr osobistych" (the Protection of the natural environment and the protection of personal interests and belongings) p. 237.

[***] W. Radecki: "Ochrona środowiska naturalnego a ochrona dóbr osobistych" (the Protection of the natural environment and the protection of personal interests and belongings) p.238

[****] A. Bałaban: "Funkcje konstytucji" (The functions of the Constitution) in "Charakterystyka i struktura norm konstytucji" (The Characteristics and structure of Constitution norms), Wydawnictwo Sejmowe, Warsaw 1997, p. 9.

as it has been intentionally placed and accepted as part of a special procedure. The problem with such a depiction is connected with the claim that the normative character can be held only by language statements, and that includes constitutional regulations, which state certain obligations for the entities applying them[*]. In other words, the problem is answering the question whether the whole text of the constitution contains procedural norms or whether some of its parts are only programme-like[**]. The stated or a different settlement of the above issue will determine the possibility of formulating – through interpretation – the legal norms on the basis of regulations being programme or declarative in character. Declining the constitution's programme entries, their normative character brings about serious consequences for the legislative process. In such a case the legislator would not be bound in any way by an entry in the constitution and the environmental protection would exclusively depend on current preferences. However, it seems that although programme-like regulations do not directly determine defined models of procedure, their presence in constitution texts cannot be interpreted only as ascertainment of a certain political fact, which may be observed within a longer time span[***]. The role of programme norms is rather directed at obliging legislative organs to keep to certain defined values in the processes of defining the directions of socio-economic development. However, in the case of programme norms, defining what behaviour is required and what is forbidden by a programme norm not only requires a complex argumentation but also referring to certain elements beyond a legal text, i.e. causal relations recognised on the basis of empirical knowledge[****]. The contents of a norm would be defined – amongst others – by applying the rules of an instrumental order or prohibition[*****]. The problem consists in the fact that such proposals are not logically justified. Each justification of norms has to refer to the principle of legislator's rationality. Therefore, it is necessary to accept a priori that programme norms on a legislative level are to indicate a content related way of legislative activity, while in the process of applying law, they are to indicate the way of its interpretation. In the first case, the projective character of programme norms renders impossible the assessment of consistency of the accepted laws with the constitution. The only criterion would be the subjective and changing in time criterion of target implementation. In the latter case one should agree, that certain legal principles result from programme norms and accept the resulting difficulty in settling the target discrepancy of these norms.

An illustration of the above-discussed problems may be the example of regulating environmental protection in the Constitution of the Republic of Poland from 1997. In line with art. 5 "The Republic of Poland ensures protection of the environment, by keeping to the principle of balanced development". The norm of art. 5 is more specific in form of art. 74 stating that public authorities run a policy ensuring ecological security to contemporary and future generations and obliges public authorities to protect the environment. Also the norm of art. 86 states that "Each person is obliged to care for the condition of the environment and is to be responsible for bringing about its degradation".

A deeper reflection on the editorial structure of the above stated regulations leads to a clear conclusion on their anthropocentric character. The contents of the above articles of the Constitution of the Republic of Poland constitute a declaration of accepting values of the natural environment. At the same time they relativise the degree of protection to the requirements of balanced development. The contents of art. 74 not only rule out the subjective interpretation of natural environment, with its idea of equal treatment of living creatures, but are also a manifestation of treating environmental protection instrumentally. What is more, by analysing the regulations above, it is easy to notice that the legal norms resulting from them, understood here as statements – in accordance with given language principles – ordering or forbidding certain behaviours to some enti-

[*] B. Banaszak "Proceduralne i materialnoprawne normy konstytyucji" (Procedural and material-legal norms of the Constitution" in "Charakterystyka i struktura norm konstytucji" (The Characteristics and structure of Constitution norms), Wydawnictwo Sejmowe, Warsaw 1997, p. 120.

[**] See A. Kubiak: "O interpretacji przepisów programowych Konstytucji" (On the interpretation of programme regulations of the Constitution) in "Państwo i Prawo" (The State and Law) 1987, No 4, p. 20.

[***] A. Kubiak: "O interpretacji..." op. Cit. p. 24 and nn.

[****] See T. Gizbert-Studnicki & A. Grabowski: "Normy programowe w konstytucji" (Programme norms in the constitution" in "Charakterystyka i struktura norm konstytucji" (The Characteristics and structure of Constitution norms), Wydawnictwo Sejmowe, Warsaw 1997, p. 95.

[*****] See: Z. Ziembiński: "Metodologiczne zagadnienia prawoznawstwa" (Methodological issues of law studies", Warsaw 1974, p. 154.

ties, do not have the character of fundamental norms. Fundamental norms show certain behaviour as some duty regardless of the target which the given behaviour is to serve. What is more, such norms are not norms of purposefulness as such norms of required behaviour are designated as a means for achieving a certain goal by the addressee of the norm and not by the norm creator. Therefore, it seems that the problem of environmental protection is regulated in the Constitution nearly exclusively by means of programme norms. This is most clearly seen on the example of the norm of art. 5 which does not show its addressee how he or she should behave in order to reach some target but shows what goal is to be achieved. Of primary importance is settling whether the norm of art. 5 is firm in character, i.e. it contains a strict requirement of given behaviour or whether it is not firm, i.e. makes certain behaviour dependant on the will of the addressee. It is commonly accepted on the basis of semantic and pragmatic analyses, that the normative statements belonging to law are firm in character, so it is the will of the issuer of a directive that determines the addressee's required behaviour[*]. However, assuming that the programme norms have the character of principles, the inability to fully implement the targets indicated by them and the possible discrepancy between targets indicated by different programme norms, does not deprive them of their binding force. In many cases rejecting this principle would cause – that in an instance of a discrepancy of the value of environmental protection with another value – the norm of art. 5 would not have binding force. Therefore, regulating environmental protection by means of programme norms does not guarantee full freedom of the legislator in defining its scope. The freedom of the legislator in this area is limited by the order to implement legislation of certain development contents. That is an order that each subsequent law implements certain constitutional principles to a greater extent than the previous one[**]. One may assume that from art. 5 an order results – both on a legislative level as well as in the process of applying law – to choose such solutions that are aimed at implementing the target of environmental protection, which at the same time hamper the socio-economic development to the smallest extent. On the basis of art. 5, in line with the principle of an instrumental order, one should carry out the deduction that "if the Republic of Poland ensures environmental protection, that means that state organs should do everything that is necessary to implement this task and not disturb the balanced development". By appropriately applying the rule of instrumental prohibition, one may construct a directive, "if the Republic of Poland ensures environmental protection, that means that state organs are forbidden do anything that would render impossible the implementation of the task of environmental protection and what is not justified by the principle of balanced development". Furthermore, it seems justified to accept – in the process of applying the norms of art. 5 – the principle that the higher the level of violating the task of environmental protection is, the more important must be the implementation of the task connected with balanced development[***].

The above considerations show that it is impossible to define *in abstracto* the hierarchy of programme norm goals. Generally speaking, it is necessary to accept that the hierarchical relations of the norms of the constitution's programme targets should be researched *in concreto* and every time it is necessary to decide, the implementation of which is more important in a given situation.

As far as this study is concerned, it is also important to stress the educational role of consitutionalisation of the issue of the natural environment protection. This function becomes most fully apparent in art. 86 of the Constitution of the Republic of Poland, which obliges all people to care for the condition of the environment by showing that everyone is responsible for bringing about its deterioration. Although this paper does not seem to create any new basis of legal responsibility for ecological damage[****], it constitutes a confirmation of the principle of solidarity within the scope of environmental protection. The proper sense of art. 86 may be read in the context of principles, which establish the right to information on the condition and protection of the environment as well as the order to support the activities of the citizens by public authorities – aimed at protecting and enhancing the condition of the environment (Art. 74 item 3,4). It seems that the message of these regulations is to stress the value of the natural environment and an appeal to all people to use its resources consciously. These regulations seem to illustrate the Kantian thesis that environmental protection is an order of human reason.

[*] T. Studnicki & A. Grabowski "Normy..." op. cit, s. 106 and nn.

[**] A. Kubiak "O interpretacji..." op. cit. p. 26.

[***] See T. Studnicki & A. Gabowski "Normy..." op. cit. p. 109.

[****] J. Menkes "Prawo do..." op. cit. p. 21.

В. Цируль

ЗАЩИТА ОКРУЖАЮЩЕЙ СРЕДЫ. НЕКОТОРЫЕ ФИЛОСОФСКИЕ И КОНСТИТУЦИОННЫЕ ВОПРОСЫ

Данная статья посвящена основным проблемам защиты окружающей среды. Первая проблема связанна с вопросом возможности принятия в позитивном праве экоцентричной модели защиты окружающей среды. В связи с этим целью настоящей статьи является краткое представление дискуссии между экоцентричной и антропоцентричной моделями защиты окружающей среды. На основании результатов данной дискуссии будет доказано, что экоцентричная модель неприменима в позитивном праве. Следовательно вторая часть аргументации связана с защитой окружающей среды в качестве вопроса конституционного права. Особое внимание уделяется проблемам, имеющим отношение к регулированию конституционной защиты с помощью программных норм. Я буду доказывать, что этот вид регулирования, принимая во внимание защиту окружающей среды, возлагает некоторые обязанности на законодателя и правоприменительные органы власти.

W. Cyrul

ENVIRONMENTAL PROTECTION. SOME PHILOSOPHICAL AND CONSTITUTIONAL QUESTIONS

This article deals mainly with basic problems concerning environmental protection. The first one relates to the question whether it is possible to adopt positive law of an eco-centric model of environmental protection. In this respect the aim of this article is to present briefly the discussion between eco-centric and anthropocentric models concerning the environmental protection. On this ground it will be argued that the eco-centric model is not applicable within positive law. The second part of the argumentation is related to the environmental protection as a constitutional matter. The text focuses especially on problems related to regulation of the constitutional protection through programme norms. I will argue that this kind of regulation with respect to the environmental protection put some duties on the legislator and law applying authorities.