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LEGAL ENVIRONMENTAL CONSTRAINTS: GENERAL THEORETICAL ASPECT

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Abstract. The article studies the conceptual basis and the general essential characteristics of public environmental requirements and constraints, focusing on the notion of legal environmental constraints as specific sectoral imperative means of regulating environmental safety enforcement, on their meaning, system, and representation in the national legislation. It is concluded that legal environmental constraints are stated and specified in regulatory acts of different legal force, different sectoral affiliation, and that the specific legislation on public environmental constraints is quite multifaceted. The article proves the necessity to systematize and unify the existing environmental requirements and proscriptions as well as to generalize the experience of their practical application in order to achieve ecologically significant aims. The research supports the proposal regarding the necessity to carry out the reform of the codification of the environmental law in the sphere of environmental safety enforcement as well as to legislate on environmental requirements and constraints by including them in a systematic way in the future code of environmental law, i.e. the Environmental Code of Ukraine.

Keywords: legal environmental constraints, environmental requirements and proscriptions, the ecological function of the state, public ecological interests, the ecological imperative, environmental safety enforcement.

1. INTRODUCTION

The resources of the planet, its terrestrial biosphere are limited and have clearly defined parameters and quantities whereas the world's population and its material needs are increasing. In the meantime, the adverse anthropogenic impact on the environment is becoming more evident; we are witnessing the increasing pollution of the air, internal waters, and seas as well as soil depletion and degradation, deforestation, the depletion of mineral and biological resources, etc. [29, p. 56]. By issuing the Decree No. 5 of January 12, 2015, the President of Ukraine ratified the Sustainable Development Strategy "Ukraine – 2020" aimed at establishing European standards of living and enhancing the prestige of Ukraine on the international arena [20]. The Strategy states the need to maintain steady economic growth in a sustainable way. Such a formulation is too vague and broad; research papers emphasize that environmental issues are not much discussed in this document. As a matter of fact, the environmental index is not included in the strategic indices of the Sustainable Development Strategy implementation. Instead, they include the number of big-screen films to be released in 2020, and the

number of medals to be won in the 2020 Summer Olympics. Thus, Ukraine virtually disregards the environmental factor in defining its priorities for sustainable development which is most likely to magnify adverse effects on the environment in the future [9, p. 83]. The 21st century is called the century of environmental protection; therefore, the incorporation of ecological imperatives into legal regulations governing different aspects of social life has to be made a priority in the policies of the new century states.

Nowadays, the anthropogenic impact on the environment can be considered critical, directly threatening the life of billions of people. Our physical existence is entirely dependent on the state of the environment; therefore, it is not a local, but a complex global problem. Today's life with its challenges require a thorough revision and reforming of the current laws and regulations on the sustainable development of the state, the preservation of the Ukrainian nation's gene pool, and the prospects for economic and social development. The reason for this lies in the immense complexity of the mechanisms underlying the operation of nature; in each separate case the impact on natural systems may be different since the nature of environmental changes depends not only on a type of influence, but on the properties of natural systems as well. Despite a frequent revision and the rapid development of legal regulations on ecology, we nonetheless consider that a thorough and gradual approach to ecologizing the national legislation will bring positive results to be reflected in newly developed and amended rules of law-making concerning ecology and economy. The priority is to achieve a balance between ecological and economic interests, to reconcile them. According to O. S. Kolbasov, material wealth and sustainable natural environment have to balance out in the system of human values whereas environmental law has to play a crucial historical role in opposing any other sphere of law keeping guard over material wealth and the authority associated with it [13, p. 90].

As the researchers of the Organization for Economic Cooperation and Development concluded, more drastic measures of environmental regulation do not have an adverse impact on economic growth. Stricter environmental requirements may have a positive economic effect, for instance, due to bigger investments in resource and energy efficient technologies. In this regard, it is important to raise the question of putting into practice the sustainable development strategy, particularly by means of complying with the existing environmental constraints (which might be difficult, especially at the early stages of their full-fledged implementation) and their possible research-backed tightening. This article is aimed at analyzing the issue of legal environmental constraints, the corresponding environmental requirements and proscriptions, their definition, meaning, systems, and their representation in the national legislation.

2. ANALYSIS AND DISCUSSION

One of the specific social functions of law is its restricting function that consists in imposing limits, "boundaries" on certain relations or preventing them from expanding [23, p. 99]. The legal constraint is defined as legal control over unlawful activity enabling the satisfaction of the interests of the affected party and social interests in protection and defence; these are legally set limits to the activity of a legal entity; the elimination of certain possibilities in the person's activity [15, p. 91]. Speaking in more general terms, the problem of legal constraints is the problem of the limits of individual freedom in society since each person's freedom stops at the point where another person's freedom begins [5, p. 53].

According to the Constitution of Ukraine and the sectoral legislation, the existence of legal constraints is one of the necessary prerequisites for protecting the rights and interests of legal entities. Legal science and practice have various means and methods of right restriction imposed by the state or set in accordance with moral standards, customs, etc. to maintain law and order [1, p. 6].

Research on environmental law, aimed at developing important theoretical approaches to the meaning of legal environmental constraints, is represented by the research papers of A. P. Hetman, N. R. Kobetska, V. V. Kostytskiy, M. V. Krasnova, M. I. Vasylieva, and others. Environmental constraints in the context of sustainable social and economic development are studied by economic

scholars (Yu. M. Derevianko, Y. V. Zhyzhytova and others). Nevertheless, the current theory on environmental law does not contain comprehensive studies on environmental constraints.

Legal environmental constraints are specific sectoral legal means of regulating the matters in the sphere of ecology and natural resources management. They include environmental proscriptions and requirements for economic activity, the restricted ownership and use of objects of nature; functional and territorial constraints on the use of water resources, based on the principles of the prevention of environmental harm and sustainable natural resource management; constraints on the public ownership of objects of nature and the establishment of public easements [27, p. 61–62].

Legal environmental constraints can be studied both in narrow and broad terms: as a synthetic means of legal regulation, mostly composed of proscriptions and obligations; and as a generic term containing constraints and different requirements for legal entities of environmental law, ultimately limiting their economic freedom [27, p. 62].

First and foremost, it should be pointed out that the main restricting environmental factor is the total limitedness of natural resources due to their natural exhaustibility and non-renewability which is a definite cause of the rising cost of natural resources and restricted access to their use. Secondly, environmental quality estimation can also be included in the system of environmental constraints; it is a degree of correspondence of natural and man-made conditions with human needs and the needs of other living organisms. A specific system of environmental standards, regulations, and constraints has been developed throughout many years and is aimed at ensuring a sustainable environmental state and regulating the use of natural resources. Environmental quality estimation is used to study the indices of the impact of industrial and economic activity on the human being, territorial ecosystems, and their components. A system of environmental standards include: standards of environmental safety, restricting standards of emissions and waste disposal, standards regulating natural resource withdrawal and management, economic environmental standards, technological environmental standards [6, p. 77–78].

The factors influencing the establishment of environmental constraints are of object- and subject-oriented nature. Its object-oriented nature reveals itself in the total limitedness of natural resources caused by their natural properties (constant resource depletion, quality deterioration, the increasing complexity of extraction) which is the main restricting environmental factor. Its subject-oriented nature lies in the ecological function of the state, its regulatory influence. Studying the meaning of the economic function of the state in the light of modern globalization processes, A. P. Hetman emphasizes its main designated purpose: to provide research-based correspondence between economic and ecological interests of society in order to develop a mechanism for environmental safety implementation, sustainable natural resource management, protection of citizens' constitutional environmental rights (the right to life- and health-friendly environment, the right to receive information on ecology and compensation for ecological damage, etc.) [10, p. 149]. In order to explain the ecological function of the state, V. V. Kostytskiy introduces the notion of the Moral and Ethical Ecological Imperative as a criterion of development and the basis of such interaction between nature and society that allows not only to preserve natural wealth for the current and future generations but to provide a congenial environment for living as well [4, p. 419]. The Ecological Imperative is defined as an urgent need to obey the laws of nature and unquestioningly accept the requirements and constraints stated by these laws in all spheres of life [7]. In general terms, it is compliance with the current and future environmental regulations and requirements, constraints and proscriptions. In the long term, the human relationship with nature will largely depend upon the level of environmental legal conscience and culture as well as on an active public stance on environmental issues.

Legal environmental constraints are contained in the constitutional provisions on the use of natural resources as the basis of the nation's life and activity and on the ecological limits of ownership rights [24, p. 156]. Thus, basic legal environmental constraints are stated in Art. 13 of the Constitution of Ukraine, according to which the land, the mineral resources, the atmosphere, the water, and other natural resources within Ukrainian territory, the natural resources of its continental shelf and its exclusive economic (sea) zone are objects of the right of ownership of the people of Ukraine. The

ownership of natural resources of the people of Ukraine is understood as a type of public ownership, i.e. the permissible relations of ownership of certain objects for the purpose of satisfying the public ecological interests of Ukrainian society (nation), exercised directly by the people of Ukraine or on their behalf by the central and local authorities within the ambit defined by the Constitution of Ukraine [22, p. 7].

Legal environmental constraints are aimed, first and foremost, at protecting public ecological interests, i.e. societal interests in ensuring environmental quality. It reflects the functional nature of environmental constraints, their designated purpose. The basis of the legal environmental mechanism has to be formed by public ecological interest [11, p. 11]. Therefore, in legal literature environmental requirements, proscriptions, and constraints are defined as public legal environmental constraints (M. I. Vasylieva). N. R. Kobetska supports the statement about the precedence of public ecological interest in formulating the aims, principles, and means of the legal regulation of natural resources management [12, p. 14]. The public ecological interests of all society are to take clear shape and acquire definite legal meaning by means of legislating on principles, priorities, proscriptions, and constraints aimed at enforcing environmental safety [16, p. 263]. Meanwhile, according to M. I. Vasylieva, the subjective idea of the people about the quality of life does not include to the necessary extent the significance of the ecological component; therefore, Ukrainian society does not demand of the state to prioritize the development of legal environmental constraints and environmental legislation altogether. In other words, the state policy is environmentally-oriented to the extent to which it is dictated by public interests [28, p. 86]. In the future, the ecological strategy has to be based on the dual process of legal conscience formation having at its core the ecological imperative and ecological conscience comprising traditional legal values.

The current legislation allows and even includes certain types of negative impacts on the environment resulting from economic activity and the use of natural resources. Nevertheless, such activity must be guided by restricting principles.

Legal environmental constraints and requirements, including those concerning economic activity, are contained in different sectoral regulatory acts. Thus, among the general principles of economic activity in Ukraine, Art. 6 of the Economic Code of Ukraine states the principle of environmental protection of the population. According to Art. 153 of the Code, the subjects of economic activity are obliged to take measures in a timely manner to prevent degradation, contamination, and depletion of natural resources and deterioration of their quality in the process of economic activity [8]. These regulations are of declarative nature and do not contain mechanisms for implementing the stated environmental requirements. It is environmental legislation that specifies environmental proscriptions and requirements for economic activity.

Negative impacts on the environment are commonly associated with the notion of environmentally damaging activity. There is no statutory definition of this notion yet. The Law of Ukraine "On Environmental Impact Assessment" defines the related notion of "environmental impact" as any consequences of planned activity on the environment, including consequences for human life safety and health, flora, fauna, biodiversity, soil, air, water, climate, landscape, natural areas and objects, historical monuments, and other material objects or for these factors regarded collectively along with consequences for objects of cultural heritage or social and economic circumstances resulting from the effect on these factors (Art. 1 of the Law) [18].

The legal aspects of environmentally damaging activity in Ukraine are studied in the PhD thesis of L. O. Bodnar [3]. Referring to the classification of O. O. Pohribniy who divides environmentally damaging activity constraints into administrative and economic, L. O. Bodnar made an attempt to analyze the current legislation on environmentally damaging activity roughly systematizing it according to administrative and economic measures aimed at restricting environmentally damaging activity. The scholar suggested the following system of the current administrative constraints on environmentally damaging activity: 1) direct proscriptions on environmentally damaging activity; 2) regulatory constraints: ecological regulation, restriction, standardization, and certification; 3) preventative constraints: permissible system and environmental licensing, compliance, approval,

ecological expert evaluation and Environmental Impact Assessment (EIA); 4) information record constraints: a record of persons engaged in environmentally damaging activity and sources of environmental danger, environmental statistics, environmental certification, environmental product declaration and labelling; 5) supervisory constraints: environmental monitoring, control, and audit. Economic measures aimed at limiting environmentally damaging activity include: ecological fiscal expansion (ecological benefits in general taxation legislation), ecological taxation (ecological tax payment), ecological insurance [3, p. 8–9]. The proposed system of restricting measures have important regulatory significance.

The legal aspects of diminishing the level of environmental danger caused by economic activity are studied in the PhD thesis of N. V. Barbashova. On the basis of the research findings, the scholar singled out three main regulatory sections in the Ukrainian legislation governing environmental safety enforcement in the process of economic activity: standardization, regulation and control of environmental pollution; the legal economic mechanism for natural resources management; ecological expert evaluation [2, p. 8].

According to A. K. Sokolova, the system of environmental requirements include: (1) environmental requirements (which should be considered general); (2) resource-related – pertaining to land, water, flora, etc. (they are principal for a certain object of nature); each main group contains specific requirements, brought to the fore when the use, protection, and restoration of a certain category of objects of nature [25, p. 129–130].

General and specific environmental requirements are stated in Chapter XI of the Law of Ukraine “On Environmental Protection” [19] which specifies the measures aimed at enforcing environmental safety. The main principle governing the regulations stated in this chapter is the principle of preventing environmental degradation and any danger to human health. The second group of general environmental requirements comprising requirements for users of natural resources are contained in the chapters of the codes and laws on natural resource management entitled “Water Conservation”, “Forest Conservation”, “Conservation of Mineral Resources”. As a rule, they address the subjects of economic activity who are not direct users of natural resources but engage in industrial and economic activity that might adversely affect the state of objects of nature and their resources [12, p. 80–81]. Environmental regulations aimed at enforcing environmental safety can be applied to all kinds of economic activity, associated with the use of energy and physical resources [2, p. 11]. Despite general requirements in the sphere of environmental protection, there are specific requirements for the location, layout, construction, renovation, opening, and use of enterprises, buildings, and other facilities (Art. 51–59 of the Law of Ukraine “On Environmental Protection”) which are specified in the corresponding regulatory acts, chapters, and articles regulating certain types of environmentally damaging activity. There is a system of requirements for the facilities of power and petroleum industries, agricultural facilities, military and defense facilities; environmental requirements that have to be complied with in the process of the production and use of means of transport and other mobile units, in handling chemical substances and waste, etc. V. V. Kruhlov proposes a rather disputable idea that the legal regulation of environmental protection activity in industry has to be aimed at achieving two goals: the prevention of new sources of pollution in the process of industrial construction, gradual restriction and, eventually, total elimination of the existing sources of pollution [14, p. 14]. As a matter of fact, total elimination of any negative impacts on the environment is impossible. The effect of environmental constraints is manifested in additional expenses, losses or lost financial advantage. It causes a decrease in economic performance. Therefore, it is advisable to raise the question of the application of specific organizational schemes and mechanisms for economy management in order to achieve a balance between ecological and economic interests.

It has to be emphasized that according to P. 3 of Art. 51 of the Law of Ukraine “On Environmental Protection”, projects of economic or any other type of activity have to contain an assessment report presenting its impact on the environment and human health. The revised List of Activities and Facilities that Pose High Environmental Danger was adopted by the Resolution of the Cabinet of Ministers of Ukraine No. 808 of August 28, 2013 [17]. The list was compiled in order to approximate those activities

and facilities, which require obligatory assessment of their impact on the environment in Ukraine, to the list of such objects contained in the Directive 2011/92/EU of the European Parliament and of the Council of December 13, 2011 on the assessment of the effects of certain public and private projects on the environment and in order to fulfill the requirements of the Aarhus Convention and the Espoo Convention.

Environmental Impact Assessment (EIA) is a complex preventative and restrictive process aimed at establishing the nature, intensity, and hazard level of any kind of planned economic activity on the environment and human health. The Procedure for Developing Environmental Impact Assessment Materials as a part of project documentation on new construction, extension, renovation, and technical re-equipment of industrial and public facilities as well as the major requirements for the content of these materials are specified in the State Building Code A.2.2-1-2003 "Construction Planning. Environmental Impact Assessment (EIA) Materials in Planning and Construction of Enterprises, Houses, and Buildings" [26].

The Ukrainian legal system has a large number of regulatory acts on environmentally damaging activity; nevertheless, these acts are not combined into a system and are often irreconcilable, contradict one another, contain essential gaps, are developed according to different strategies for regulating environmentally damaging activity [3, p. 8]. Legal environmental constraints are stated and specified in regulatory acts of different legal force, different sectoral affiliation; the specific legislation on public environmental constraints is quite multifaceted. The situation is paradoxical: for the most part, environmental principles and mechanisms are present, although "scattered" in different research studies [21, p. 33] and in different sectors of legislation.

Since Ukraine has chosen the European course of development, it has to comply with the environmental protection standards of the member states of the European Union. The problem of a thorough balanced approach to optimizing the legislation on environmental safety enforcement in compliance with European requirements and standards is now becoming more urgent. In the meantime, national peculiarities and the specific priorities of the state should be taken into consideration; environmental requirements have to be determined by the current degree of environmental protection. As H. V. Anisimova rightly pointed out, one of the means of such optimization is to carry out the reform of the codification of the environmental law in the sphere of environmental safety enforcement; although it will not be easy, it will give the opportunity to adopt a modern, in terms of quality and methodology, regulatory act with totally new or revised regulations necessary for creating a modern legal environmental framework [4, p. 490], with special significance given to an organized system of environmental requirements and constraints. To conclude, these requirements might be contained in the following chapters: 1) constraints, proscriptions, and requirements for specific types of environmentally damaging economic activity; 2) constraints and requirements for the safe use of natural resources; 3) legal mechanisms for enforcing environmental safety.

3. CONCLUSIONS

Legal environmental constraints are specific sectoral imperative means of regulating environmental safety enforcement in the course of activity of potentially environmentally damaging nature and consists in legislating in a systematic way on environmental measures, requirements, proscriptions, sanctions and mechanisms of their implementation and application.

The primary goal is to systematize and unify the existing environmental requirements and proscriptions as well as to generalize the experience of their practical application in order to achieve ecologically significant aims.

Regulatory acts containing environmental requirements and constraints have to be developed and included in a systematic way in the future code of environmental law. The conceptual basis and the general essential characteristics of public environmental requirements and constraints at least have to

be manifested in the Environmental Code of Ukraine, the adoption of which is supported practically by all the leading Ukrainian scholars in the sphere of environmental law.

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У статті досліджуються концептуальні засади та загальні сутнісні характеристики екологічних вимог і обмежень, а саме поняття еколого-правових обмежень як специфічного галузевого імперативного способу регулювання відносин щодо забезпечення екологічної безпеки, їх зміст, система, стан нормативно-правового закріплення. Встановлено, що еколого-правові обмеження фіксуються та деталізуються в актах різної юридичної сили, різної галузевої приналежності, спеціальне законодавство про публічні екологічні обмеження є досить розгалуженим. Доведено необхідність систематизації та уніфікації існуючих екологічних вимог і заборон, а також узагальнення досвіду їх практичного впровадження з метою досягнення екологічно-значимих цілей. Підтримується пропозиція щодо необхідності проведення кодифікації-реформи екологічного законодавства у сфері забезпечення екологічної безпеки, в тому числі фіксації екологічних вимог і обмеження через системне викладення їх у майбутньому кодифікованому акті екологічного законодавства, яким повинен стати Екологічний кодекс України.

Ключові слова: еколого-правові обмеження, екологічні вимоги і заборони, екологічна функція держави, публічні екологічні інтереси, екологічний імператив, забезпечення екологічної безпеки.