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Normative Inflation – Cause of Inefficiency of Romanian Environmental Law

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Legislative inflation, defined as an abnormal multiplication of legal norms, seems to be a natural and widespread phenomenon, but if certain limits are exceeded, the negative effects begin to appear. These occur primarily on litigants, but also on those who are charged with enforcing the rules. The normative excess encountered in Romanian environmental law generates first of all a diminution of confidence in its power to ensure the protection of fundamental rights, such as: the right to a healthy environment, the right to life and the right to health. Then the overproduction of norms gives rise to serious distortions in the application of the law or even comes to the impossibility of its application. In this context, this article launches an invitation to reflection on the causes and consequences of this phenomenon, and finally calls for a process of reforming the law making and enforcement activities of environmental law. Beyond presenting from a critical perspective the situation of the environmental legislation in Romania, the main objective pursued by this study is to propose possible solutions to remedy the situation found. A possible solution lies in the normative simplification that can be achieved through an efficient process of systematisation of laws, through the realisation of a coding in the matter and through incorporation.

Keywords: *Environmental legislation; Legislative inflation; Specialised courts; Codification in environmental law; Simplification of legislation*

Introduction

The emergence of norms and principles of environmental protection was not achieved without efforts, but was nevertheless supported by a strong consensus that finds its foundation in the imperative of the survival of spaces and species.

Environmental law, however, succeeded in being “a law of universal vocation, a law of conciliation and solidarity”[1]. Its universal vocation results from the fact that it transcends both the frontiers of time, because it implicitly seeks to protect future generations, but also those of space since, for the most part, its norms, before they materialise at national level, are conceived at Union and international level. Cooperation between the world’s States is essential to meet the challenges that affect us all, from droughts and floods to pollution and threats to natural capital and biodiversity.

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[1]Morand-Deviller (2010) at 3.

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We are also in the presence of a solidarity law because its norms redefine human-nature relations, giving environmental law the task of bringing good to the world. Moreover, in a relatively short time, this branch of law reconciled with one of its rival principles, that of economic development, which is why it is also considered a conciliation law.

Despite these performances, however, environmental law quickly succumbed to the excess and instability of regulations - a cause of legal insecurity that is hard to bear for the person faced with the application and compliance of its rules.

In this context, the main purpose of this study is to note some shortcomings in the lawmaking in the field of Romanian environmental protection. Also, a subsequent objective is to propose a debate on the functionality of the rules in the field.

As specific objectives that we propose in this study, we mention:

- to research and identification of the causes and consequences of normative excess in the matter,
- to establish whether it is just the lack of effectiveness of national laws or the fact that they lose authority to other competitive norms,
- to identification of the possible solutions to get the environmental law branch out of this impasse.

Research Methods

To achieve the goals, several scientific research methods are combined, namely: logical, historical and quantitative methods. The way the subject is treated confers to the study an interdisciplinary character reflected by the documentation sources belonging to various fields: environmental law, general theory of law, constitutional law, European Union law, international law, history of law, political science and so on. In carrying out the work, we used both traditional bibliographic documentation but also direct documentation through which concrete data was obtained that prove the normative excess. All these research means and methods have given us the opportunity to identify some possible remedies for increasing the accessibility of Romanian environmental law.

Environmental Legislation – "Huge and Intricate Weaving"

Among the branches of the Romanian law system, environmental law seems to be among the most affected by legislative inflation.

Environmental legislation has become "a huge and intricate weaving", permanently incurring more or less necessary changes.

Warnings about the negative effects of legislative inflation have been formulated since the times when it was present only in germs. For example, C. Tacitus in *Anale* pointed out that "*Plurimae leges corruptissima respublica*"[2] (the

[2]Tacitus, translated by Guțu (1995).

overabundance of laws disintegrates society) and that the first laws in the history of humanity were simple, “understandable to people with still unrefined minds”.

The same complaint recurs in all eras. Thus, Montesquieu noted that “useless laws weaken the necessary laws”, then Portalis stated that “in history, barely two or three good laws are promulgated in the span of several centuries”[3]. For Benjamin Constant, the multitude of laws constitutes a great danger that threatens representative government, “it is the disease of representative States for in these States everything is accomplished by laws, the absence of laws being the disease of unlimited monarchies, where everything is done by men”[4]. In Rousseau, the multitude of laws is proof that they are stupid, that they are not appropriated or recognised by those to whom they are addressed. “Good laws attract even better ones” Rousseau noted, and “bad ones bring even worse ones”[5]. Later, Jean Carbonnier added: “legislative inflation has as a consequence the ignorance of the laws, their inefficiency which leads to their devaluation in the public mentality”[6].

The speech has the same particularities today, but it must be resumed with greater power because the negative effects produced by the inflation of laws have not changed, but have been amplified. The rates of normative excess are much higher than the times when Tacitus, Montesquieu, Rousseau or Portalis formulated the fundamental principles of laws. Legislative inflation is not only a simple topic of discussion appreciated in the environments of contemporary constitutionalists, it is also a tangible and quantifiable reality[7].

In Romania, during the post-revolutionary period (1990-2023), 10524 laws were adopted. To these are added the ordinances and the government emergency ordinances, whose number, since 1997, has experienced a real explosion, their sum being 5549 in the analysed period[8]. We did not take into account government decisions or other normative acts issued by local or Central Public Administration authorities, but their number is also high, which makes us generally talk about normative inflation.

The most serious seems to be the situation of environmental law. Beyond the framework-normative act in the matter, Government Emergency Ordinance (GEO) 195/2005 on environmental protection[9] there are numerous other normative acts that regulate in a large number of pages and in a language inaccessible to the mere litigant, each area of environmental protection.

Without exhausting the list, we enumerate only some of the most important laws, ordinances and emergency ordinances for environmental protection in our country:

[3]Portalis (2004) at 14.
[4]Constant (2006) at 59.
[5]Rousseau translated by Stahl (2005) at 87.
[6]Carbonnier (2002) at 123.
[7]Duminică (2014) at 39-40.
[8]According to the data available in the online Directory of the Romanian legislation, the Legislative Council on http://86.105.216.122:83/RO_Update/LexUpdate.aspx.
[9]Consisting of 66 pages and amended 19 times since the entry into force According to Sintact.ro module as accessed on 10.06.2024.

Law no. 104 of 15 June 2011 on ambient air quality,
Water law no. 107 of 1996,
Forest Code, Law no. 205/2004 on animal protection,
Law no. 191/2002 on public zoos and aquariums,
GEO no. 23/2008 on fishing and aquaculture,
GEO no. 57/2007 on the regime of protected natural areas, conservation of natural habitats, wild flora and fauna,
Law no. 82 of 20 November 1993 on the establishment of the "Danube Delta" biosphere reserve,
GEO no. 92/2021 on waste regime,
GEO no. 68/2007 on environmental liability with regard to the prevention and repair of environmental damage,
Law no. 278/2013 on industrial emissions,
GEO no. 9/2013 on the environmental stamp for motor vehicles,
Emergency ordinance 196/2005 on the environment Fund,
Ordinance 6/2021 on reducing the impact of certain plastic products on the environment,
Government Emergency Ordinance no. 58/2012 on the amendment of some normative acts in the field of environmental and forest protection,
Government Emergency Ordinance no. 43/2007 on the deliberate introduction into the environment of genetically modified organisms,
Ordinance 40/2006 for the approval and financing of priority multi-annual environment and water management programs,
Law no. 43/2014 on the protection of animals used for scientific purposes,
Law no. 407/2006 on hunting and hunting fund protection,
Law no. 301/2015 on establishing the requirements for the protection of the population's health with regard to radioactive substances in drinking water, etc.

To all these acts government decisions, minister orders and acts of local public administration, are added but especially the numerous regulations of EU law.

Like any other Member State, Romania has assumed the obligation to correlate the internal legislation with the EU legislation by transposing and implementing in the internal legal order of the Union *acquis* the adoption and transformation of national legislation in such a way as to comply with the rules of Union law.

The regulatory structure of the European Union in the field of environmental protection is complex and evolutionary. Union law includes: the provisions of the treaties and derivative law. This derivative law is made up of regulations (binding and directly applicable in the States), directives (binding for each member State, but leaving the possibility for national authorities to find the form and means by which the result is achieved) and decisions (binding in all their elements and in which the addressee may be a State or several or even an individual). To these rules are added opinions and recommendations that do not bind States in a mandatory manner and other series of unnamed acts[10].

The rules of Union law are usually imposed with the greatest hardness at national level. In this regard, the European Council has repeatedly recognised the

[10]For developments, see Marchetti (2023) at 533-548; Vâlcu (2022) at 368-374.

superiority of Union regulations, then directives, over subsequent national law. The rules of written law also add to the decisions of the Court of Justice of the European Union. Thus, whenever national courts have doubts about the interpretation of EU law or the validation of acts adopted by the EU institutions, they can ask the Court of Justice of the European Union for a clarifying decision[11].

According to art. 288 (2) of the Treaty on the functioning of the European Union (TFEU)[12], "The regulation has general application, is binding in all its elements and applies directly in each Member State".

The large weight of the norms developed by the European Union institutions in the field of environment, the assertion of their supremacy over domestic law, the priority of conventional international law and the consequences arising from this for the national law system represent some elements that exert pressure both on the litigant and on the bodies charged with the application of its rules. For example, according to the website of the Central Public Authority for Environmental Protection, 11 regulations are listed that apply directly in our country only in the case of protection of the atmosphere[13], to which are added the directives and the various decisions. In the area of water protection, the Union legislation is equally thick. By way of example, we list only a few of the Union directives currently being implemented by our country:

Directive (91/271/EEC) on the urban waste water treatment,
Water Framework Directive (WFD),
Directive (2006/7/EC) concerning the management of bathing water quality,
Directive (91/676/EEC) concerning the protection of waters against pollution caused by nitrates from agricultural sources,
Drinking Water Directive (98/83/EC),
Marine Strategy Framework Directive (2008/56/EC),
Floods Directive (2007/60/EC) and so on.

Last but not least, this situation is complemented by the impressive number of international conventions and treaties.

Also in the case of environmental law, similar to the other branches of law, the question of the relationship between domestic and international law[14] is solved primarily by the provisions of art. 11 and art. 20 of the Constitution. Thus, according to art. 11, "the Romanian State undertakes to fulfil exactly and in good faith its obligations under the treaties to which it is a party. Treaties ratified by Parliament, according to law, are part of domestic law. If a treaty to which Romania is to become a party contains provisions contrary to the Constitution, its ratification can take place only after the revision of the Constitution".

Art. 11 of the Constitution imposes a principal priority of all international treaties over domestic laws, which have a supra-legislative position in the internal hierarchy of legal norms in our constitutional system, but an infra-constitutional

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[11]Dragomir & Niţă (2009) at 44; Andreescu & Puran (2023) at 22-23.
[12]JOUE C 326 of 26 October 2012.
[13]https://www.mmediu.ro/articol/legislatia-ue/1486 accessed on 20.02.2024.
[14]See also Duminică (2015) at 43; Duminică & Tabacu (2012) at 37-49; Ștefan (2023) at 578-579.

position because if a treaty to be ratified contains provisions contrary to the Constitution, it will be able to be ratified only after the revision of the Constitution[15]. Accordingly, art. 11 establishes a monism with the priority of conventional international law.

As an example, we list only a few international treaties in the field of environmental protection ratified by our country:

the UNESCO Convention on the protection of the world heritage, cultural and natural, of 16 November 1972 (ratified by Decree no. 187/1990),
the Convention on Wetlands of International Importance Especially as Waterfowl Habitat, concluded in Ramsar, on 02 February 1971 (ratified by Law no. 5/1991),
Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, concluded on 22 March 1979 (ratified by Law no. 6/1991),
Convention on the Protection of the Black Sea Against Pollution, signed in Bucharest on 21 April 1992,
Convention on the Conservation of Wildlife and Natural Habitats in Europe, adopted in Bern on 19 September 1979 (accession by Law no. 13/1993),
Convention on Cooperation for the Protection and Sustainable Use of the Danube River (ratified by Law no. 14/1995),
Convention on the Conservation of Migratory Species of Wild Animals, adopted in Bonn on 23 June 1979 (accession by Law no. 13/1998);
Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD), New York 1976,
Convention on Environmental Impact assessment in a Transboundary Context, Espoo (1991),
Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), Washington (1973);
Vienna Convention for the Protection of the Ozone Layer (1985),
Convention on the Law of the Non-Navigational Uses of International Watercourses, New York (1997),
Convention on the Protection and Use of Transboundary Watercourses and International Lakes, Helsinki (1992) and so on.

Possible Causes and Consequences of Normative Inflation in the Field of Environmental Protection

The question is whether this normative excess is generated by the need to reduce pollution or it stems largely from a faulty implementation of the lawmaking activity.

It is true that the multiplication and diversification of polluting factors cause the proliferation of the environmental legal norm, but at the same time, at the level of those involved in the lawmaking activity there is an "assumption that when a system does not work it is the law that underlies it and then it must be changed. This attitude has created a normative boost in Romania: everyone demands the

[15] Duminică (2014) at 57-58.

change of laws every day, and those in charge to do regulate it do it with a rapidity and with an amazing lack of coherence. Laws never seem to be enough [...]"[16].

Beyond the natural phenomenon of legislative development, in recent years another, illegitimate, was born, namely the lawmaking in order to obtain political capital. Every new minister, every MP or senator wants to initiate a law to which their name is bound. Thus, political alternations indirectly favour the multiplication of legal norms, especially in a sensitive and global field, such as environmental law.

Very often, the creation of a new legal norm is not the result of a real need for lawmaking, but rather arises in order to satisfy an acute need for publicity of its initiators. Moreover, even where normative intervention is necessary, its legitimacy is paralysed by the media spectacle[17].

Another cause of the increase in legal norms was the integration of Romania into the European Union. EU directives are binding on each receiving Member State as to the outcome to be achieved. National authorities have the right to decide on the form and means by which the objective is achieved. Therefore, the directive must be transposed into national law, and this is usually done by adopting a new domestic normative act. Consequently, the hyper-normativity that currently particularises EU environmental law indirectly also generates an increase in national legal norms.

At the same time, the experimental, ephemeral character of certain norms, but especially the technicalities or excessive specialisation of environmental protection laws generates unstable legislation, difficult to interpret and apply.

The way in which the text of the laws is drawn up is not characterised by a concise formulation, but by a detailed one and with highly technical terms. Although many normative acts also contain legal definitions of the terms used, as is the case of GEO 195/2005 which contains 74 legal definitions, this does not ease the task of the practitioner in applying the respective norm. In the mind of the average man a feeling of insecurity is triggered. Objectively, the individual is subject to arbitrariness if he cannot know or often understand the rules of law to which he must obey.

Therefore, the overproduction of norms gives rise to serious distortions in the application of the law or even to the impossibility of its application, being annihilated the balance that should exist between norms and their application. These are just some of the reasons that led the renowned authors in the field to state that "a major problem of environmental law is represented everywhere, and especially in Romania, that of its effectiveness, resulting primarily from the confrontation of the legal state with the real situation expressed through the data related to the social-legal and judicial realities"[18]. In the same vein, a French doctrinaire found out that "environmental norms appear everywhere, and their application is nowhere"[19]. Unfortunately, this statement fully reflects the situation that environmental law crosses.

[16]Dănişor (2013) at 12; Dănişor (2009) at 9.
[17]For the same opinion see Dănişor (2011) at 15.
[18]Duțu (2020) at 11.
[19]Fonbaustier cited by Duțu (2020) at 11.

Codification and Specialisation of Jurisdictions - Possible Remedies

Simplicity, clarity and technical quality, essential peculiarities of the law in general, do not characterise the laws in the field of environmental protection, requiring a serious reform in the field.

One possibility, often invoked to break the deadlock, is to initiate a "genuine legal revolution", one that would begin "with taking environmental law seriously"[20].

Simplifying environmental legislation means making it much more approachable, that is, allowing each person to easily identify and understand the essential rules of law to which they must obey.

The concept of simplification can be analysed from two perspectives. From a practical perspective, simplification can be defined as the means of guaranteeing the intelligibility of the legal norm, aiming to satisfy the principle of clarity of the law and the objective of knowing the meaning of the law. The second aspect of simplification is to identify the means to stem the normative excess, to make shorter laws, containing the general principles, so that each person can easily distinguish the essential from the accessory, and the legislator can easily legislate the great changes that occur at the level of society, as well as to present the laws in an organised ensemble[21].

Simplification is thus a condition of the quality and efficiency of the legislative system; and the only (technical) solution possible[22].

Therefore, a solution to simplify environmental legislation would be to exclude from the legislative system superfluous laws. This exclusion can be achieved through the so-called legislative improvement that is required to have a continuous character. Through it, the legislation is "cleaned" of the normative acts and of the obsolete provisions, contradictory to the norms in force or to be adopted, using primarily the institution of repeal.

The improvement of the legislation is also enshrined in the provisions of art. 17 of Law 24/2000 on the norms of legislative technique for the elaboration of normative acts[23] which stipulate that "in the process of drawing up the draft normative acts will be aimed at the express repeal of the legal provisions that have fallen into disuse or that register aspects of contradiction with the envisaged regulation".

Simplification can also be achieved through an efficient process of systematisation of legislation, through codification, incorporation, including republication of normative acts.

Systematisation is considered to be a particularly important legal activity, both for the elaboration and for the realisation of the law, resulting in the creation of collections (compilation) of normative acts classified either chronologically or according to the object of regulation (by legal institutions), or according to the criterion of their legal force, these criteria being also be combined[24].

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[20]Duțu (2020).
[21]Duminică, *Criza legii contemporane* (2014) at 117-118.
[22]In the same sense, Duțu (2015).
[23]Republished in the Official Gazette no. 260 of 21 April 2010.
[24]Craiovan (2009) at 415.

This activity of systematic examination and processing of existing normative acts, grouping them according to certain criteria, allows to ascertain and eliminate possible contradictions between normative acts, allows to improve, unify and coordinate the entire legislation. The systematisation of normative acts facilitates the knowledge of law, the interpretation of normative provisions and the correct application of legal norms. Therefore, it is a determining factor of the effectiveness of law[25].

The higher form of the systematisation of law is codification, being also one of the important factors of legal certainty. In respect of this, art. 18 of Law 24/2000 on legislative technical norms stipulates that "in order to systematise and concentrate legislation, regulations in a particular field or branch of law, subordinated to common principles, may be brought together in a unitary structure, in the form of codes".

In this regard, we consider, along with other authors[26], that it is necessary to initiate a comprehensive codification operation of environmental law as "codification is not a simple remedy to legislative inflation, but is the expression of a rational law based on a logical and systematic method that must allow the establishment of general principles and provide for concrete and understandable consequences for the individual"[27].

Definitely, starting such an approach is not easy at all, the key factor being the political will. Given that the idea of codifying environmental legislation is accepted, a first stage of this process is the identification of the realisation formula.

Regardless of the chosen formula, it is necessary to respect the Constitution of Romania, the Union law and the international law in the matter. After this stage, the systematisation procedure actually follows. The easiest way would be to unite, regroup the legislative texts in force and order them. However, the benefits of such an approach are minimal, and the rationalisation of environmental law is not realised. Therefore, in order to achieve the much-desired intelligibility and accessibility of the norms of this branch of law, we propose, together with other authors, the reformatory codification, also called creative or innovative. On the one hand, new rules inherent at the time of its conception can be integrated, and on the other hand, parallelisms can be eliminated, contradictions corrected, legislative overlaps within the framework of a general effort to rationalise, update, modernise and integrate environmental legislation[28].

Regarding the possible structure of the Romanian Environmental Code, the starting point in its construction is the framework-normative act GEO 195/2005 on environmental protection. Starting from this normative act, the plan of the new normative act can be realised. Thus, it will be possible to find a general part (comprising general principles, essential concepts) and a special part developing the rules applicable to each environmental factor.

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[25]Vonica (2000) at 399.
[26]Duțu & Duțu (2014) at 61-67; Marinescu (2010) at 54; for a broad overview of the advantages and necessity of developing an Environmental Code, see Duțu (2006).
[27]Nadaud (2008) at 255.
[28]Duțu (2006).

The procedure for drafting the Code will follow the special rules contained in art. 27-29 of Law 24/2000 on the norms of legislative technique. In particular, in the case of draft codes or other complex laws, at the initiative of the Parliament or the government, specialised commissions may be set up at the Legislative Council or under its coordination for the elaboration of those drafts. These specialised commissions will draw up, on the basis of studies and scientific documentation, prior theses reflecting the general conception, principles, new guidelines and main solutions of the envisaged regulations. Before completing the theses, the conclusions of the studies are submitted, for expressing the point of view, to the ministries and other public authorities concerned. These preliminary theses, as it results from art. 28, are subject to government approval. Only after this approval, the drafting Commission will proceed to drafting the text of the future normative act. As for the adoption, in accordance with art. 29 Law 24/2000, the draft normative act, accompanied by a report, will be submitted to the Parliament or, as the case may be, to the government, for the initiation of the legislative procedure.

Last but not least, another solution proposed in the literature to increase the effectiveness of environmental law, which, in turn, we consider pertinent and necessary, is to ensure "access to a specialised, specially institutionalised and professionally and legally competent justice, so that the scientific community and civil society have new possibilities to ensure the defence and promotion of the general interest of environmental protection"[29]. It was proposed to set up specialised courts in environmental protection matters that would be competent to deal only with cases dealing with environmental actions. "Such a court would also imply the existence of specialised police officers; of magistrates specialised in environmental issues; of a will of the public ministry to integrate the fight against ecological delinquency among the priority objectives; of experts not only specialised, but also having the necessary equipment for various measurements"[30], including lawyers specialising in environmental law.

Conclusions

The growth of the rules of law, the legislative instability, the decrease in the quality of the normative content, the uncertainties that characterise the conditions of application, generate a legal insecurity hard to bear for the person faced with the application of the law, the individual being subjected to arbitrariness if they cannot know or understand the rules of law to which they must obey.

In this context, we consider that the proposed ways of legislative simplification will help the environmental law to find its strength and thus fulfil its objectives: rational use of natural resources, protection of the natural and artificial environment, life and health of people, protection of all living things and living conditions, in a word, ensuring the "common good'.

Whether it is the technique or the legislative procedure, the role of the control and evaluation mechanisms in the elaboration of the norms of environmental law,

[29]Duțu (2020).
[30]Dușcă (2021) at 28.

the bodies involved in the lawmaking activity must have as their desideratum at least three interrelated aspects: legal security of the person, legislative simplification and efficiency of the legislation.

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