

---

## **SOME METHODOLOGICAL ASPECTS OF DESIGNING REGULATIONS AND SETTING PRIORITIES IN ECONOMICS UNDER TRANSITION**

BÁNDI, GYULA

Scientific Director, COPERNICUS Environmental Law Programme of the Danube region, University "Eötvös Loránd" Faculty of Law, H-1053 Budapest, Egyetem tér 1-3, Hungary

### **SUMMARY**

Countries in economic transition must think over the state of environment and the state of environmental regulation and environmental enforcement. In the long run economic changes, evolution of a market economy cannot exist without clear requirements, providing certainty for the economy and also for the society. Environmental regulations and priorities in these countries on the one hand may follow some general directions, and on the other hand may have certain features that are characteristic for the transition era. In the first part those common options are examined that appear to some extent in all environmental regulatory schemes, like the comparison of command-and-control approach vs. market-oriented measures. In the second part the methodological problems cover those questions that are similar in countries under transition, for example, the property constraints and the possible limitations of property freedoms. Finally, the decision in regulatory methods and directions needs a clear-cut organisational background with the eminent role of public administration together with the control of the public over the administration.

### **1 INTRODUCTION**

*First:* Transition, that is "passage from one state or condition to another" (1) or "a passage from one state or stage to another, b) movement, development, or evolution from one form, stage or style to another" (2), has nowadays a distinguished meaning. It is applied to characterise the changes in political, economic and social life in the former socialist countries. If we carefully look at the dictionaries' terminology, the last wording gives a development perspective to the word, thus transition means an "evolution." Therefore, in the following I use this phrase in a broader sense than simply the transition in the former "Eastern block" countries. Instead, I understand all the qualitative changes in a positive perception under this term, that means transition may take place in a developed country also, if, e.g., the environmental concept, regulation, and enforcement are changing fundamentally. Of course, I would rather use the examples of the Central and Eastern European countries than of other countries, but I regard the problems and possible answers to these problems as representative to a number of "transition" cases.

*Second:* Transition as an evolution does not necessarily equate with definite environmental improvement. The No. 99 Worldwatch Paper reads: "One of the distinguishing features of the East European revolutions of 1989 is their strong environmental component. In numerous instances, the environment in the pre-revolution days served as a rallying point from which broader demands for political change emerged." (3) This starting point could easily give the impression to the one who analyses these regional revolutions that this promising commencement may conclude in clear environmental betterment. The past three to four years did not prove this impression in any of the CEE countries. The significant drop in air pollution in Hungary was due more to the series of bankruptcies than to the aforethought environmental regulatory innovations. Transition is not a quick process, but needs time. Also economic transition alone will not lead to transition without proper social and environmental changes. For those who did believe that economic transition was a quick and autonomous process, e.g., the election results in Russia or the relative lack of environmental consciousness proved to be a "wake-up" call.

*Third:* Anyway, the transition process is much longer than simply an election period of the new democratic parliaments. Thus, we may still hope that environmental improvement and political or economic transition would go hand in hand. If we pretend that it is possible or even essential, than it is worth analysing some conceptual and methodological issues of environmental enforcement, first of all from the point of view of regulatory conditions for effective enforcement.

## **2 BASIC METHODOLOGY OF REGULATION**

From among the number of different problems around environmental enforcement, probably the most relevant is to decide what kind of methods to take as basic conditions for regulation. The methodology here means the underlying concept or regulation. Although the historical development, the national characteristics of the states have a determining effect on the legislative concept, some of the main decisive problems remain the same all over the world, and most probably the final outcome of the competition between methods shall be similar. The primary reason for this potential similarity lies in the regulatory subject, the environment, that is impartial and global. I make a distinction among three methodological problems:

- Media-specific regulation vs. integrated pollution control.
- Command-and-control vs. market-based approach.
- Quantitative standards vs. technology-based methods.

### 2.1 Media-specific vs. integrated regulation

As the history of environmental law began with the dispersed, case-by-case, element-by-element type of regulation due to the early problems of recognising the complexity of the environmental puzzle, no wonder why this era was characterised by the media-specific regulation. This is not a major obstacle in itself and also not a merit, but a fact following from the trend of development. The media-specific regulation is rather a limit in the way of structural handling of the case. After a time of developing the environmental sectors separately, the need for harmonising the similar types of instruments comes to the forefront.

Also later in time it became clear that the media-specific regulation is rather a restriction than an advantage, as most of the environmental pollution emissions may easily be transferred to another sector, another element of the environment. The integrated pollution control on the other hand (is less stock) to the given environmental media, but tries to control the impact on the overall environment. A good example for this kind of concept is the issuance of a complex environmental permit, instead of several individual permits for water use, land use, air pollution emissions, etc. (4) Also the Hungarian law introduced a kind of integrated environmental permit, given to those investments, that require an environmental impact assessment. The integrated pollution control also has an effect on the organisational structure of the protection, as most of the environmental tasks should be integrated into one system. Thus the integrated pollution control method is not really a counterpart of the media-specific regulation, but it is rather representing the next and more developed level of environmental protection. The distinction as we made here therefore is not a real dichotomy, but rather a way of accepting the reality that in a number of countries the legal environment is not capable at the moment to follow the concept of integration.

As a next field of this question and also a way of shifting to our next subject is the interpretation of integration into the legal system, especially into the economic regulation. Probably the most exciting challenges are how to integrate environmental implications in the process of developing market economy, how to harmonise the needs for developing market economy with environmental requirements, and what kind of development strategy to choose. This issue is by no means one of the most important challenges for those countries that have entered into the market development

only recently, like the Central and Eastern European countries. There are two principal options in connection with this understanding integration:

- To integrate environmental requirements into market economy development with restructuring the economic management.
- To take environmental requirements into consideration but to give priority to market development and together with this postpone the integration to a later stage, after strengthening the economy.

The CEE countries and other countries in economic transition now have a big chance to follow the first option, simply because they get rid of one economic management system in order to develop a market-oriented one. The support should focus on the process of this kind of integration. A fundamental precondition of this is to create in these countries a clear-cut environmental policy, environmental strategy.

## 2.2 Command-and-control vs. market-based approach

The traditional idea of environmental regulation is to set up priorities, to describe the required environmental situation, and to allocate the necessary instruments and organisation in order to execute the legal requirements. These requirements are controlled by the state in most of the cases, who imposes sanctions on the polluters infringing the legal regulations. An emerging technique is to influence the market or to allow the market to regulate itself in order to achieve the designed objective, a determined state of environment. Thus this second methodological question is connected with the development strategy. The basic discussion point that is reflected in this dispute over the methods is to find how to put a price on the environmental interests as any other commodities, that is, how to internalise externalities. This may be translated as the need for integrating environmental requirements into the socio-economic structures.

### 2.2.1 Combining command-and-control and market-based approaches

The main alternatives range from command-and-control mechanisms to a market-based approach. A third option is to develop the two together, as there is no way to separate the strategies from each other. In principle it is possible to make a distinction between the two methods, but in reality there is no way to separate them absolutely. No market economy can live without regulation, and an absolute free market does not exist. The regulatory element is even greater in the field of environmental protection than in other regulatory areas. Also the market-based approach itself is a legislative and management product. It is obvious that the use of strong market incentives cannot live without an existing enforcement system and more probably without an existing market. American experts wrote in their analysis of comparing these methods: "It should be noted that market-based policies themselves must involve some regulatory constraints on pollution and they require government supervision and enforcement to ensure that the goals are achieved." (5)

The Agenda 21 (6) of the Earth Summit in Rio reads:

"8.13. Laws and regulation suited to country-specific conditions are among the most important instruments for transforming environment and development policies into action, not only through 'command and control' methods, but also as a normative framework for economic planning and market instruments."

The EPA paper for the Second International Environmental Enforcement Conference summarises its opinion on the role of marketing and even banking pollution rights as one option for economic desires in connection with the self-regulatory role of market in connection with the Lead Phasedown Program of the United States: "Although the emission reductions from direct enforcement were large, the sharp decline in new violations after 1986 suggests that enforcement had an even larger impact through deterrence." (7)

Therefore, the best alternative should be to strengthen command-and-control mechanisms while implementing a wide range of economic incentives, from tax incentives to subsidies or environmental labelling. These instruments mean a transition into the direction of a reasonably market-oriented approach. The OECD defines economic instruments in the following way:

"Economic instruments constitute one category amongst others of environmental policy instruments designed to achieve environmental goals. They can be used as a substitute or as a complement to other policy instruments such as regulations and co-operative agreements with industry...One basic objective of economic instruments is to ensure an appropriate pricing of environmental resources in order to promote an efficient use and allocation of these resources." (8)

The best method of achieving compliance among the market players should be to use market-friendly measures that orient the possible polluter in the direction of meeting environmental requirements. In this respect there is a changing attitude towards harmonising economic development purposes and environmental protection requirements. Any intervention to the market may be used as an incentive or disincentive.

## 2.2.2 Creating market incentives

Although the creation of market incentives and instruments is the primary chance and responsibility of the state, we identify three basic types of economic means according to the cast—who is performing the active role. The leading role could be undertaken by the state, by national and international financing institutions, or by the polluter itself. We have to clarify here that the regulatory power lies in the state in all of these cases.

### 2.2.2.1 The state

The state is the main player in charges that mean payment for the impact on the environment, based on some quantitative aspects of this impact, on the characteristics of pollution. Charges are also called fees. They have the following categories:

- Effluent or emission charges (fees paid on the basis of the quantity of emitted substances).
- User charges (fees for using natural resources, like water).
- Product charges (fees levied on certain product that certainly pollute the environment, thus it has a direct connection with waste stream).
- Administrative charges (fees paid for administrative procedures).
- Tax differentiation.

The state is also the main player in subsidies given by the state, mostly based on the specific environmental budgets or funds to help the polluter defray the cost of compliance, namely:

- Grants (that may be either reimbursable or free).
- Soft loans (offered by the state resources, like funds).
- Tax allowances.

Together with subsidies, the price systems and pricing certain natural resources or services should also be mentioned, where the state is formulating limits and controlling the prices.

We separate here from taxes the use of customs with the possible preferences and aversions.

The full picture requires mention of enforcement incentives or penalties, and within this the role of non-compliance fees or fines and performance bonds. The latter means payments to an escrow account set in the polluter's budget, where the bonds are to be set aside in order to be used for activities improving environmental quality.

Special, less incentive-like but market-oriented way of influencing environmental interests is the regulation and possibilities—even financial—of using state property and state services.

A more direct intervention by the state is the use of the different ways of giving direct financial assistance to environmentally dictated solutions. Some specific circumstance may give rise to this kind of direct action.

Eco-labelling should also be mentioned here as something developed on the basis of patent law. Manufacturers may receive an eco-label, proving the environmental friendly attributes of their product.

A new experience in the field of state activities is the policy of “debt for environment swap” of those states lending money to other states. This good example for a new and international market incentive has been introduced in Poland in 1992 (9).

#### 2.2.2.2 National and international financing institutions

The national and international financing institutions are the main players in a number of ways. The World Bank or the European Bank for Reconstruction and Development, for example, developed strategies for their own role in the environmental protection. Of course, the domestic banks may use the same methods, such as:

- Developing specific lending policies to private ventures.
- There is a chance of direct investing as taking an equity share.
- Useful market incentive can be if a bank refrains from giving guarantees.
- We also may add, first of all, in case of the international financing institutions the role of advising and training.

Of course, the intervention of financing institutions may easily have a much more negative result, namely this can contribute to disruption or pollution, through lending to comparatively less advanced technologies, businesses, or even states, where democratisation could not reach the desirable level.

#### 2.2.2.3 The polluter

The polluter is the main actor in using the following, partly state-regulated instruments:

- Deposit-refund systems, where the state gives the framework, but most of the action is laid on the polluter. The given products appear in the market with a deposit, like the one on bottles, that is refunded when traded back or to someone who collects them.
- Market creation, and in particular the problem of marketing the pollution rights in combination with the bubble principle. Tradeable permits, e.g., allow companies to trade permitted emission rights with other companies, and the concept of ‘bubbles,’ which means some geographic limit may be added.
- The offset approach is something close to market creation, with the difference that the agreement remains within the same facility. Thus the facility may propose various approaches to meet the environmental objective. The result is that the facility may emit more from one substance trading in a less emission from another.
- Requiring compulsory insurance services or, instead, creating pools for giving guarantees in case of possible liability.
- Finally, we should not forget the effect of self-regulation. Here I may mention issues like self-recordkeeping, environmental auditing, development of environmental management systems, etc.

### 2.3 Quantitative standards vs. technology-based methods

The last methodological question is how to define the permissible and acceptable level of pollution. One option is to put somehow a quantitative ceiling on the emissions, so setting a quantitative standard. The other method is to restrict the pollution in a way that the polluting activity receives some qualitative regulations, so to regulate the technology.

Situated between legislation and the public administration regulation, quantitative standards present a challenge of translating environmental requirements into a numeric form in order to make enforcement programs easier. The efficiency of the standards always strictly relies upon the main purpose of quantitative standards and the monitoring capacity of enforcement administration. Here we mention standards only in the context of finding their place in regulation in general. Standards can serve a role in prevention or serve as the basis for liability or sanctions. We can distinguish first environmental quality objectives like emission or ambient standards that fix the limit using a kind of ecological bearing capacity concept, and discharge or emission standards that impose a fixed discharge limit on the emission of pollutants. The quality objectives or standards are goals at the same time and usually written in units of concentration. The discharge standards are connected with some specific periods of emissions—mostly hours or days—and are attached to pollution sources. They limit the quantity of the discharge that a facility can release into the environment. Also the discharge standards can be further categorised into two large groups: the group of product and the group of performance standards. Product standards determine the substance or composition of a product, or the design and construction of a given product. Thus when using product standards somehow the technology or the production itself is affected. The performance standards determine the level of given pollutants that a plant may emit. Thus the performance standards leave the question of technology open.

In environmental terminology they used to mention standards of competence of operators or safety standards. These regulations represent an intermediate level between the traditional quantitative standards and the technology approach. These standards do not determine the quantity of substances, but instead they set up some kind of behavioural or proficiency levels.

The technology-based methods try to regulate the procedure, the course to the discharge of pollution in a way to limit or prevent the pollution as much as possible. These methods—some call them also standards, technology standards—require that the polluters use a particular type of technology to control and/or monitor emissions. The most well-known option is the best-available technology (BAT) option, which is used also in the European Communities. The EC qualifies this BAT requirement as BATNEEC: best-available technology not entailing excessive costs. Most of the time the relatively too-high extra costs are used as a limit to unrealistic requirements. The American Clean Water Act in its 1983 amendments used the BAT requirement as “best available technology economically achievable”.

Another kind of technology requirement appears in the Clean Air Act 1990 amendments. That is the “good engineering practice.” “Good engineering practice” means the high necessary to ensure that emissions from the stack do not result in “excessive concentrations” of any pollutant in the “immediate vicinity” of the source.” (10) Also the American environmental regulations introduced such technology requirement as the BCT—best conventional pollutant control technology—from 1984 in the Clean Water Act rules. Under the BCT policy the costs also received a decisive role, “the reasonableness of the relationship between the costs of attaining a reduction in effluents and the effluent reduction benefits derived.” (11)

Of course, the technology requirements sometimes are too vague for regulating the emissions. Also these requirements need in most of the cases explanations and interpretation on lower administrative levels. If we add that there are attempts in developing countries or in Central and Eastern Europe to attach not only an “excessive” or “unreasonable” qualification to the technology but also some reference to the present economic difficulties, which can serve as a good escape under the strict regulations, there shall be no doubt that the technology requirements alone are not satisfactory and not always reliable. This also means that sometimes quantitative standards may be

somewhat more documentable even in countries like Britain, where technology requirements have always been more favoured: "We are entering a new era of legal formalism in relation to pollution standards and objectives. The long-familiar preferred approach of a legal framework concentrating on administrative structure and procedures, leaving policy content to the realm of shadow mechanisms such as circulars or technical notes no longer holds true." (12)

Thus, our conclusion in the case of all the three methodological aspects is that the different methods shall be used parallel and in their complexity. For countries in economic transition it is also an important lesson that there is no generally acceptable pattern of environmental regulation and enforcement. If one takes the example of Britain, some years ago the technology requirements were the winners, and nowadays there is more and more room for the quantitative standards. Also the method of marketable pollution permits and rights require not only a dynamic market but also sophisticated enforcement agencies, who may take care for the infringement of market behaviour.

It is worth mentioning a recent American publication on exporting environmental protection: "Conditions that have provided fertile ground for environmental protection in the United States include cultural attitudes shaped by affluence, established free market institutions, heavily developed communication and other infrastructures, private industry sectors that seek profits from managing pollution and waste disposal, and industries that have learned to incorporate environmental considerations into their businesses. Such advantages are rare in Central and Eastern Europe and are largely absent in the former Soviet Union." (13)

### **3 LIABILITY PROVISIONS, FOREIGN MONEY, AND PROPERTY ISSUES**

When determining what type of liability provisions should be employed in transition countries, most of the possible answers are not exclusively situation-specific. Criminal liability may also exist, administrative levies are even more favoured than it is acceptable, and economic difficulties sometimes limit the possible use of the tool of closing the polluting facilities. What is the most exciting is to determine how to make a priority list between past damages and future anti-pollution strategies, also how to allocate the existing limited resources. If one speaks about the past environmental damages, two major alternatives could be mentioned: polluter pays principle versus or together with consumers pay principle.

As an additional element for making a full picture in countries under economic transition, the privatisation, first of all the involvement of foreign money, should also be covered. Liability provisions shall have a different understanding if new owners are involved in a mass.

Among the several possible options, mention should be made of the following:

- Who is liable after privatisation, concession licences.
- The liability for wastes, especially hazardous wastes—legal and illegal disposals.
- Who is liable for specific fields such as public transport, health-care, social services.
- How to create and use funds—government, local government, or business funds.

Last but not least, the question of liability-guarantees should also be raised, like compulsory insurance or joint pools of the polluters.

#### **3.1 Polluter pays principle**

If one takes first the definition of polluter pays principle, than the initial problem is to understand the definition. Under the comprehensive concept of the principle, polluter pays means: "Anyone whose activities cause or are likely to cause damage to the environment shall bear the cost of full preventive or restorative measures." (14)

Polluter pays thus is interpreted in a complex way, as it covers all the responsibility to take actions and to bear the costs and pay for the possible damages. The OECD explained this principle in similar terms:

"The Polluter Pays Principle ... implies that in general it is for the polluter to meet the costs of pollution control and prevention measures, irrespective of whether those costs are incurred as a result of the imposition of some charge or pollution emission, or are debited through some other suitable economic mechanisms, or are in response to some direct regulation leading to some enforced reduction in pollution." (15)

From these definitions it is obvious to come to the point where the principle shall be understood as a pool of all the necessary legal measures, in other words, complexity of legal measures. If the costs are to be covered by the polluter, than the measures also belong to his sphere of interest. If the costs mean all the costs of possible preventive and pollution control measures, then certainly the widest variety of legal responsibilities and liability shall be there. Therefore, we do not create a new principle of complexity of legal measures, but instead we interpret polluter pays wider, corresponding with the present concepts.

### 3.2 Consumer pays

Consumer pays as a principle means that the burden for past damages is not on the specific polluter but on society. In the case of CEE countries or countries, where state property exceeds the average percentage, the polluter indirectly is the whole community, as state property has been taken as the property of the community. In this respect, consumer pays has a different and more specific meaning as in the case of market economies.

The basic puzzle here shall be how to provide funding for the restoration of the environment. We have to learn in general what are the sources of the government environmental resources, knowing that all the sources have the same origin, namely the state revenues grouped or allocated according to the interest of environmental protection. Sometimes the state revenues are gathered in one sum and reallocated according to the different needs, in other cases these revenues are even collected especially for satisfying environmental interests. The possible main bunches of environmental sources can be:

- State budget, also the division of tax income.
- Different fees and prices for the use of environmental resources.
- Financial sanctions for those activities, infringing environmental requirements.
- Loans and credits.
- Voluntary donations.

The state budget is the simplest source of government resources, where the income of the budget is not altered particularly on the basis of environmental reasons. The inside structure of the budget does not necessarily give enough guarantee for using the financial resources always for environmental reasons.

The special fees for the uses of different environmental resources are serving two functions, they are economic incentives and at the same time they provide financial basis for further environmental programs. The revenues collected from sanctions are different from the fees, as they also represent a negative classification of the given activity, infringing the basic environmental requirements. The most exciting source here shall be the privatisation price or at least a part of it. This problem is addressed under 2.3.

The loans and credits are given—mostly from international banks, foreign governments, other funds—to the government to fulfil environmental obligations. The credits of this kind always need to be justified by later government actions. These loans and credits can be managed separately or can be added to the funds. The debt for environment swap is a unique solution in this field.

The voluntary donations are not given directly to the government but may be given to the funds, run by the governments. The possibility of giving such donations is very small today.

The next questions concerning the government resources are how to use these resources, what are the conditions to use them, and how much they are connected to the specific environmental purposes. More questions also cover the issue, whether it is possible and under what circumstances to use the money designated to environmental assignments for other purposes. From that point of view, the regulation of such resources giving or limiting the chance for reallocation or redistribution is the most important. The environmental part of the state budget is the most vulnerable from that respect, as this has the closest possibility to be used for other purposes than environmental. The special environmental funds designated for specific purposes, projects, or media or the one comprehensive fund—the method may be different—is more visible, and the regulations governing the funds usually do not allow the use of resources for other reasons than environmental protection. The other determining factor can be the method of control over the use of funds, where public participation may have a decisive role. The more publicity is given to the reports on utilisation of the funds, the less is the chance to misuse them.

### 3.3 Privatisation and the involvement of foreign money

These questions are the specialities of countries in economic transition, as both are the problems representing a mass development. Privatisation here has its own puzzle, as possibly not every new owner is willing to undertake the liability for past environmental damages. Theme No. 5 of the Second International Enforcement Conference has touched upon the problem. Here it has been mentioned, among others, that “investors need a level of certainty. As the liability or past environmental damages is particularly important, among the solutions one possible way is to create funds from purchase prices.” (16)

The issue of involving foreign money covers at least the problems of foreign direct investment, privatisation, and concession licences. There are several options to handle environmental protection needs of this kind, such as:

- To impose comparatively less strict environmental requirements in order to attract foreign money.
- To use requirement similar to existing and new facilities, which represents a generally lower level of standards.
- To use higher level (e.g., in CEE countries EEC) standards for new facilities and a graduated compliance schedule for existing ones.
- To use high standards immediately, which embodies the hazard of numerous bankruptcies in the case of existing own facilities.

In the author's view the third alternative should be supported also by banking policy. Anyhow, clear decision-making in this question is necessary to give firm basis for business planning.

More from an ethical liability point of view, the involvement of foreign money may also have the threat of exporting pollution, exporting wastes, exporting polluting industries. This ethical problem may also lead to a legal liability if either the importing or the exporting countries are regulating the arrival of foreign money, foreign businesses. The best way would be to require from the newcomers to use the same standards as in their home countries. The other major liability problem in this field is the illegal export of pollution, mainly hazardous wastes. Under the heading of “secondary raw-material” or “recycling,” possibly a great and uncontrolled mass of waste is crossing the borders, from the direction of developed countries to CEE or developing countries.

The experiences of the CEE countries could prove that the export of pollution is a real danger in cases of smaller or even medium-size foreign industries, while in the case of big companies or multinational enterprises the situation is totally different. The smaller businesses have fewer assets to invest in environmental improvement and rather think in shorter terms of profit-making. On the other hand the big companies have their own environmental management policies and their own international environmental standards, and moreover they think in medium or long term investments. Sometimes it is very difficult to understand the reality of this notification, as it appears in the following:

"However, the 'greens' believe that U.S. companies are 'exporting' pollution. This perception is extremely difficult to overcome, since these people have never seen how a well-controlled industrial operation can function... In summary, the basic and overriding objective in international operations is that no operation, activity, or product, when properly conducted or handled, should cause a significant or permanent adverse effect on health or the environment." (17)

The abovementioned business planning point of view requires proper regulation of exporting industries, techniques, and products. This regulation leads to predictability and stability in economic development, both being essential conditions of future enforcement of liability provisions.

### 3.4 Property situations

The countries in economic transition all try to build a market economy. No market economy can live in a situation, where the state property is overwhelming. This means the necessity of rearranging the proprietary conditions. The most important tool is the privatisation or reprivatisation. Here I do not want to come back to the privatisation problem, but only to the question of new proprietary environment. A great number of new owners show up, first of all in land ownership. I examine here two related questions: the limitation of property rights and the compensation for this limitation.

The limitation of property rights, first of all, of freedom of using property, is a delicate question in countries where these freedoms were more or less neglected. The rule of law state and the market economy for most of the people also mean the freedom of enterprise and the freedom of property. From that perspective, the totalitarian state may be more effective from an environmental point of view, with neglecting freedoms, even personal integrity. Thus the problem has an inherent political interpretation as well. Anyhow, in modern societies it is impossible to predict the total freedom of property, likewise it is meaningless to speak about total sovereignty in international relations.

Environmental consideration, such as social security or public health, cannot work without direct or indirect interference into property rights and freedoms. In modern societies these environmental considerations are even getting broader and broader in connection with the growth of ecological degradation. A recent manual on environmental law sums up the historical development as follows:

"In most states, private property may be expropriated by the state for the creation of nature reserves or public trusts, or servitudes may be established, such as height restrictions on buildings, which restrict property use for the benefit of others. The concept of neighbourliness, linked to the tort of nuisance, serves to limit potentially harmful uses of property. European states vary in their approaches to these issues and the degree to which the rights to private property owners are subordinated to environmental concerns." (18)

These restrictions are easier to put into use in the case of transition economies if the environmental concerns are present from the very beginning. Later it should be more difficult to restrict the newly provided freedoms.

One has to investigate the compensation for the restrictions of property conditions together with the limitations themselves. The freedom of property, the freedom of the owner to use his property should not be absolutely free. If we accept these limits, then the next step should be to accept that the compensation is not always a substantive element of these limitations. Environmental values, such as the restriction of the use of chemicals in agriculture due to nature conservation considerations, are implicit components of rights and obligations. Above this conceptual explanation there is also the practical argument against the total compensation, that is, the problem of high costs, which is even more vital in case of countries in economic transition than in developed countries.

Those restrictions that seriously affect the use of property need to be compensated. If we take the example of nature conservation interests, then the sudden change in priorities that leads to new and costly changes in agriculture may result in compensation.

Both the issues of property restriction and the necessity of compensation are vital parts of the new property conditions and need a clear-cut regulatory approach. Like liability problems, property conditions require predictability and stability. It is not enough from an enforcement point of view to leave the question open, as it happens even today in most of the CEE countries.

## **4 PUBLIC ADMINISTRATION ORGANS AND PUBLIC PARTICIPATION**

### 4.1 Organisation at regional or local levels

When one examines the structure of different national state organisation, there are federal states with to some extent independent regions or states and unilateral states with one state centre only. In the case of a federal state, the abovementioned national organisational level may be duplicated, as there can be a federal and a state level structure and organisation. We do not go into the details of this organisational issue, but it has to be mentioned that federal states have more difficulties with coordination than unilateral states, but on the other hand the states may have a great positive effect on each other's legal development in the field of environmental protection.

#### 4.1.1 Balancing centralisation/decentralisation interests

The general question of state organisation is to decide in the problem of balancing centralisation interests with decentralisation interests. In a democracy all levels of government have to be involved. Some even say that if possible a governmental task has to be implemented on the lowest level of administration possible. Of course this view simplifies the problem. True, however, is that a too centralised approach of the division of powers in a state will not work well.

Decentralisation exists in two ways: general and functional. Most decentralised authorities are general authorities for whom the implementation of environmental policies is only one of their tasks. They have a general governmental task insofar as their task is not limited by the task of higher authorities or by the task of a special authority. These limitations may appear in a Constitution or an Act. These general decentralised institutions both have a "regional" and/or "local" government and a council that is elected. Functional decentralisation is concentrated to one special task. For example, the task of water management is often given to independent water authorities.

As a consequence any kind of legislation must regulate the rights and obligations of regional or local governments because, according to the act on local governments, only the Parliament may refer any responsibilities to them. Local governments are functioning in federal or unilateral states either. Their role is to represent the interests of the given community, to undertake public services (like water supply services), and to solve local administrative issues through their regulatory and public administration functions. Local governments are organised both at regional and local levels, where their functions and authorities should be different. The best would be to allocate services, authorities, other functions all in a way to meet the significance and magnitude of the given responsibility. Of course, a number of political interests influence this organisation.

Of course, there are a number of problems that argue against decentralisation. One of them is that other local interests next to the interest in a good environment play an important role in the decision-making of this kind of general democratic decentralised government on a local level. Short-term economic interests such as the possibility to get a new factory and therefore new employment are thought to be more important. Here is a serious problem. On the one hand a democratic government is needed to take environmental policy seriously for people will not accept it otherwise. On the other hand other interests can be thought to be more important in a democracy, so the environmental policy will not be a priority.

The combination of various arguments results in choosing the regional government for some environmental tasks. On the one hand there stands the need to know the local situation and on the other hand to avoid the conflict with other local interests. On the one hand there is the need of

democracy and the involvement not only of an elected council but of other people too and on the other hand the need to place the environmental policy in a wider context than only locally. There is the need to work effectively and to have a civil service large enough to have the various necessary scientific disciplines. All this results in most countries in a division of the various legal instruments of environmental law over three layers of democratic authority.

Most literature takes the following principles as guiding rules for finding the proper balance of centralisation-decentralisation:

- Small sources of nuisance/pollution can be dealt with on a local level by either permits or by control and enforcement of the implementation of nationally made general rules for special categories of installations.
- Permits for big installations are given on a regional level, which preferably would mean a regional government.
- Planning and programming of environmental policy and enforcement on every level of administration according to the tasks given.
- General legislation on a national level.

The general rule is: The lowest possible level of administration is chosen for a specific task. Decentralisation is given priority over deconcentration (19).

We take as a last important issue the necessary coordination of local government actions. It is an important conclusion that the system of regional-level local governments or at least regional-level institutionalised local government cooperation is vital. While generally it is less viable to decentralise the environmental authorities and decision-making capacity to smaller villages or towns, it would be essential to provide the basis for decentralised and democratic division of power. This level of local government could be capable of solving environmental problems representing also the regional or local interests. The necessary steps for this end should be, if we take all the abovementioned problems into consideration:

- To find the ways of making local governments more interested in environmental protection.
- To oblige the deconcentrated environmental authorities to help to promote the cooperation between local government and also between these regional organs and local governments.
- To promote the cooperation of local governments in environmental interests also with the help of proper legislation.
- To establish or reinstate the special status of the regional level local governments. This would mean exclusive regulatory and decision-making, so authority rights and duties.
- Together with the abovementioned requirements, to regulate also the division of power between local and regional governments and also between the decentralised and deconcentrated organs.

#### 4.1.2 Division of environmental responsibilities

The national environmental protection authorities together with their regional or even local administrative organisation—such as the environmental inspectorates—have been and are organised for the different environmental tasks. In the creation of this organisational structure, the size and geographical situation and general state of balancing state power of the country are decisive. Therefore, the ways of organising the environmental administration may be different, but one organ is missing: the environmental emergency service. This organisational system means the deconcentration of state power, that is to leave the authorities in the hand of the central organs but to authorise the regional or local levels of the same state organisation for exercising different enforcement jobs so as to allocate the authorities.

The regional or local organs of the central state administration have two groups of responsibilities: those tasks that are rather connected to the making and management of environmental policy, and those tasks that are more practical, so the public administration authorities.

The execution of the tasks that belong to the first group makes it possible for public administration to solve environmental problems on the basis of comprehensive longer-term concepts. For this reason the regional organ (inspectorate) in its territorial jurisdiction among others:

- Monitors the condition of the environment, evaluates the related data, and forecasts the changes.
- Organises and operates the regional information system on the environment (monitoring), cooperates with other information system, and provides data itself.
- Realises professional environmental coordination for the whole of its jurisdiction.
- Provides the laboratories requisite for the work of public administration.
- Carries out operative tasks related to the elimination of environmental damages.
- Cooperates with local governments in matters related to environmental protection and helps local governments perform the environmental tasks within their jurisdiction.

The other large group of tasks of the environmental inspectorates contains the administrative authority, official tasks, i.e., the tasks to be performed by public authorities. The area of individual administrative tasks usually is very large. Because it is impossible to enumerate them all here, we shall limit ourselves to surveying the most important ones, knowing that there are a number of country-specific differences:

- Right of granting permits (e.g., the neutralisation of hazardous waste).
- Right of imposing obligations.
- Right of granting exemptions from obligations imposed by the authorities or the statutory regulations.
- Right of prescribing the closing down of a plant.
- The determination of regional or individual emission values.
- The imposition of environmental penalties.
- The limitation of activities causing pollution.

#### 4.2 Public participation

Public participation in regulation, decision-making, and enforcement is a general principle of the protection. The right of public participation shall create an obligation towards state power, state organs. As we do not examine this problem under other environmental law problems, in the following we summarise the major characteristics of the whole issue. Public participation can be justified among others by the following basic concepts:

- Self-determination, which means that nations or groups or individuals have the right to determine their own future and have the right to decide upon their own property.
- Right to environment as explained above.
- Democracy, which means making decisions by the opinions of the majority while also safeguarding the rights of the minority.
- Public property, because some elements or parts of the environment can be characterised as being public property. But even in those areas that are private property, a kind of public utilisation is also possible, giving room again for public involvement. The example of water rights is important.

- Public health, as health problems can be either physical or mental. The link between the environmental pollution causes and human health consequences is sometimes perfectly clear but in a number of other cases less so.

When discussing public participation, mention should be made of the use of public participation, which covers issues like:

1. Just decision-making, as just decisions require a careful balance of interests and a careful evaluation of a given situation, but it is always difficult to find a final decision that shall be satisfactory to all the possible parties. A real just decision never exists, only a more or less just decision. Our aim could only be to push this chance towards "more" from "less."
2. To receive support from the public, among others also involved in decision-making. This support may mean:
  - An initiative for the future direction of state activity.
  - The easy acceptance of state decisions.
  - The above mentioned two shall support the creation of credibility.
  - A better possibility of compliance.
3. To receive information from the public. Factual information is the most important in local issues, where the local people shall have more knowledge on the particular situation than for example the regional environmental inspectorate.
4. Assistance in control and enforcement in addition to using it as a temporary and occasional source of information.
5. To live in peace with the public, to create a better image.

Finally it is also important to highlight the conditions of public participation, giving only a short summary of those legal preconditions for public participation, that are essential for concrete public participation:

- First, access to information has to be regulated together with all those aspects mentioned in the relevant points above, like determining the terms of business secret and providing legal remedies.
- The general and detailed rules of the obligation to involve the public in legal regulation and decision-making are missing today. This is the classic equivalent of public participation.
- There is no obligation to answer public suggestions or questions, although it is essential to prove somehow the understanding on behalf of the state organs.
- Basic regulations can and should be interpreted in a way to give general standing for the interested public in administrative procedures, but due to possible wilful misinterpretation, it is essential to determine clearly or to make concrete the standing in administrative law.

## ENDNOTES AND REFERENCES

1. The Meriam-Webster Thesaurus, Springfield, Massachusetts, USA, 1989, p. 584.
2. The Penguin English Dictionary, 1985-86, Penguin Books, 1985, p. 887.
3. French, H.F., Green Revolutions: Environmental Reconstruction in Easter Europe and the Soviet Union, Worldwatch Paper 99, November 1990, p. 6.

4. The Environmental Protection Act 1990 in Britain provides a good example for this concept: "...Part I of the Bill introduces the concept of integrated pollution control, and for a specified and limited number of industrial processes will provide a common set of legal controls over physical emissions of whatever type, be they to land, air, or water." Macrory, R., *Environmental Law - Shifting Discretions and the New Formalism*. In: *Frontiers of Environmental Law*, Warwick Law, London, 1991, p. 11.
5. Dudek, D., Stewart, R.B., and Weiner, J.B., *Environmental Policy for Eastern Europe: Technology-Based Versus Market-Based Approaches*, December 1991, p. 13.
6. Section I. Social and Economic Dimensions B. Providing an Effective Legal and Regulatory Framework, see footnote 1.
7. U.S. Environmental Protection Agency, Office of Enforcement, *Principles of Environmental Enforcement*, February 19, 1992, pp. 11-37.
8. *Environmental Policy: How to Apply Economic Instruments*, OECD, Paris, 1991, pp. 10-11.
9. "The idea was born in spring 1991. At this time Poland achieved a 50 % reduction of its outstanding foreign debt. The Paris Club agreed that the additional 10 % of Poland's debt could be swapped in a series of bilateral voluntary agreements between Poland and each of the 17 creditor countries of the Club. The Polish government used this opportunity to launch a large-scale "debt-for-environment" programme that would target investment projects identified as having international priority in four areas..." Paper of Maciej Novicki, director of ECOFUND, p. 2, delivered at the General Assembly meeting of the Regional Environmental Centre for Central and Eastern Europe, December 2, 1993.
10. Findley, R.W. and Farber, D.A., *Environmental Law*, Nutshell Series West Publishing Co., 1992, p. 115.
11. See above, p. 139.
12. See Macrory, pp. 16-17.
13. Bell, R.G., "Exporting Environmental Protection," *Environmental Law Reporter*, December 1993, p. 10,701.
14. Article 10 of the Council of Europe Draft Model Act. The Council of Europe Directorate on Environmental and Local Authorities began to draft a model act especially for the use of CEE countries in 1992. The present paper uses the September 1993 version.
15. Note on the Implementation of Polluter Pays Principle (OECD, Paris, 1974). McLoughlin, J. and Bellingier, E.G., *Environmental Pollution Control*, International Environmental Law and Policy Series, Graham and Trotman/Martinus Nijhoff, 1993, p. 146.
16. Summary of Theme No. 5., *Economic Development and Ownership Changes*, Proceeding of the International Conference on Environmental Enforcement, Volume II, September 22-25, Budapest, Hungary, p. 224.
17. Friedman, F.B., *Practical Guide to Environmental Management*, Environmental Law Institute Monograph, Washington, 1991, p. 66.
18. Kiss, A. and Shelton, D., *Manual of European Environmental Law*, Grotius Publications Ltd., Cambridge, 1993, p.13.
19. Lambers, C., Comments on "State of the Environmental Law in Hungary," Report of the Hungarian Environmental Management and Law Association, Groningen, March 1993.