

The Evolution of the Juridical Context of the Danube River Protection

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Abstract: The present paper analyses the determinants of the evolution of the juridical and administrative-institutional context of the Danube River protection. The continental conception and the utilitarian approach regarding the issue of the environmental protection are used as a methodological guiding mark for the analysis of the legal context. The evolution of the legal context in Romania is strongly influenced by the evolutions of the international regulations on the matter, as well as by the social-economical context of the country. In the Notes that underlie the normative acts that regard the Danube River and the Danubian territory and within the content of the normative acts the establishing of interdependent connections between the economic and social development and the protection of the Danube River can be noticed. The general conceptions expressed by the national legislation have evolved from a utilitarian approach to a holistic one, but its application is generally a challenge caused by the lack of planning, of coordination, and of an adequate mode of funding.

Keywords: legislation; utilitarian approach; interdependency; harmonization; coherence

The urge for action regarding the protection of the Danube River becomes as clear as much as alarming in the middle of the 80's. The growth of human population and the industries in full expansion in the last 150 years have caused serious environmental issues. Approximately 80% of the dampy areas of the Danube disappeared at the end of the 19th century, and it endangered key species such as the pelicans in the Danube Delta and the beavers of the Superior Danube. Pollution, especially through organic substances and nutrients, represented a major threat for the environment in the long run. The ecological and social-economic disaster in the 70s and the 80s, mainly caused by the enormous nitrogen pollution rate that the Danube River delivered to the Black Sea, destroyed the ecological balance. Numerous dead algae and other aquatic species covered the beaches in Romania and West Ukraine. Approximately 40,000 km² in the North-West of the Black Sea were

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declared to form a “dead area” with insufficient levels of solute Oxygen in order to maintain any kind of life¹.

The situation needed unprecedented international cooperation. Since 1948, when The Convention Regarding the Danube River Navigation Regime was signed in Belgrade, it offered the riverain states more authority and power on the Danube and the Danubian basin, the dominant political influence in the area exercised by the satellite riverains remained the Soviet Union (Turliuc, 2008). However, the Convention Regarding the Danube River Navigation Regime does not include provisions regarding the stoppage or the reducing of the pollution of the Danube waters. The Commission for the Danube River, an organism with the role of “watching for the execution of the provisions of the Convention”² tried all the same to extend its competence regarding the environmental protection by adopting provisions regarding the protection of the river. In 1961, it adopts a provision having the character of a recommendation that regarded the deposit of waste oil coming from ships. The document forbade the ships to discharge oil waste or any other products, no matter the method, and it requested that these should be deposited in fix or floating, as provisioned by the riverain states. In 1991, the dominant political force in the region collapsed after half a century and 8 other tragic years marked by the disintegration of Yugoslavia made the efforts of cooperation regarding the water and environmental protection even more complicated. The void created by the breaking of the Soviet Union, the dominant economic engine in the region became the European Union.

The promise of adhering to the EU and the future need to respect the environmental provisions conferred the driving force for the environmental changes in the Danube basin. The European Commission became one of the biggest and more impressive international organisms of experts in the field of global administration of water resources in the world, and it promoted political agreements and established priorities and common strategies in order to improve the basin. This permanent organism, financially tenable, is now vital for the maintaining of the agreement of continuity and the efficient and lasting administration of the Danube River.

The general juridical context for the protection and lasting using of the water and other ecologic common resources in the Danube basin is represented by the Convention Regarding the Protection of the Danube River. It was developed through an initiative of the Romanian Government in 1985 (The Bucharest Declaration) and signed at Sofia in 1994 by 11 riverain states (Austria, Bulgaria, Croatia, the Czech

¹ Reducing the load: Managing transboundary nutrient pollution in the Danube/Black Sea basin, <https://www.thegef.org/news/reducing-load-managing-transboundary-nutrient-pollution-danubebblack-sea-basin>.

² The Convention on the Danube Navigation Regime, signed at Beograd on the 18th of August 1948, along with the two addenda and the additional protocol of 18.08.1948. The text was published in Romania's Official Journal. Adopted since 30 October 1948, art. 8. lit a.

Republic, Germany, Hungary, Moldavia, Romania, Slovakia, Slovenia, and Ukraine. The Convention was effectively adopted 4 years later, on the 22nd of October 1998 when the 9th subscriber adhered to it. It is considered to be a remarkable fast adherence for a complex document that covers delicate and often controversial issues¹.

The main objective that the Convention Regarding the Protection of Danube River declared envisages the insurance of the administration and lasting and fair utilisation of the surface and the deep waters in the hydrographical Danube River basin. The measures by which the principle is to be put into practice involves: the conservation, amelioration and rational utilising of the surface and deep waters as preventive measures of fighting dangers generated by accidents that involve flooding or dangerous substances, measures for reducing the sources of pollution. In this way, by signing the Convention an urgent need of coherency regarding the protection of some natural resource having a great economic value in all its forms of utilisation was met; it suits the cooperation regarding the fundamental elements of managing the waters by adopting “all the legal, administrative, and technical adequate measures in order to maintain at least and where it is possible the improvement of the actual quality of the water and the environmental conditions of the Danube River and the waters in its area of capture in order to prevent and reduce as much as possible the adverse effects and the changes that appear or can be caused”.² The countries agreed to offer information to one another about the environmental conditions of the cross-border waters; about the emissions and the monitoring of the water quality by focusing on the results of the monitoring and the evaluating of the water and its branches, as well as on the results of the controls of conformity to the objectives regarding the quality of the water and the conditions of authorization (Kittinger, pp. 43-44).

Shortly after signing the Convention, the International Commission for the Protection of the Danube River and its permanent Office are created. The commission is mainly authorized as the organism of implementation and expertise of the Danube Convention regarding the administration of the hydrographical basins in Europe. The International Commission for the Protection of the Danube River is in charge not only of Danube itself but also of the entire Danube basin that involves its branches and the resources of underground water.³

After 2000, based on the voluntary political agreement of all the Danubian countries, the main priority of the Commission became the putting into practice of the UE Framework Directive regarding water as it is considered the most important directive regarding the protection of the surface and undersurface waters. The Framework Directive regarding Water 2000/60/CE engages the states that are members of the

¹ Reviving the Danube, <https://www.thegef.org/news/reviving-danube>.

² <http://www.icpdr.org/main/icpdr/danube-river-protection-convention>.

³ <http://www.icpdr.org/main/icpdr>.

EU and the countries in the process of becoming members (candidates) to use a holistic approach of the hydrographical basins for the administration of the water resources. Even the countries outside the EU agreed to respect the Framework Directive regarding water. Effectively, all the Danube countries are guided by a unique legal context that regulates the waters in the area¹.

Many other directives regarding the environment, politics and conventions are related to Directive 2000/60/CE and have to be taken into consideration for the complete integration of the politics regarding the development of the river transport, including the Directive for the Habitats and Birds (Nature ecologic network of 2000) and the Convention of Bern (Emerald network).

The quality of the state member of the EU determined Romania to adopt the national provisions to the community standards. It is estimated that 75%-80% of the Romanian environment law is of a European origin (Duțu, 2012, pp. 208-212). Also, a connection to the European institutional structures and meanwhile in a way the control of the way of transposing and applying of the legal acts regarding the environment, also through the EU and the Court of Law of the EU were realized².

In 2017, Romania had under legal proceedings (in the EU Court of Justice) 3 proceedings of infringement (the erroneous application of the provisions of Directive 2008/98/CE regarding waste deposits, not adopting the necessary measures on the base of Article 4 and Article 13 line (2) of the Directive 2006/21/CE regarding the administration of waste from the extractive industries) and other 10 proceedings of infringement in pre-trial stage out of which 7 were in the application with delay stage and 3 of them in the stage of reasoned opinion. One of these refer to the systematic breaking of Directive 2000/60/CE for the establishing of a framework of community politics in the water area, of Article 4 (3) of the Treaty regarding the UE and of Directive 92/43/CEE regarding the conservation of the natural habitats and the species of wild animals and plants in the process of authorizing micro-hydropower plants in Romania³.

Romania also received the reasoned opinion for not meeting the deadline of adopting Directive 2014/52/UE regarding the evaluation of the effects of certain private and public projects on the environment. Directive 2014/52/UE imposes obligations that lead to the insurance of a high level of protection of the environment and the human health by establishing the minimum of requests for the evaluation of the impact of the projects on the environment. With the purpose of realizing the named object, the new EIA Directive provisions that the procedures of establishing and evaluating of the impact on the environment should consider the impact of the whole project,

¹ <http://www.icpdr.org/main/icpdr>.

² <http://www.icpdr.org/main/icpdr>.

³ The Green Journal accessed at <http://revistaverde.ro/2017/12/28/ministrul-mediului-gratiela-gavrilescu-din-ce-in-ce-mai-multi-romani-vor-opta-pentru-autovehicule-cat-mai-putin-poluante/>.

including the stages of construction, functioning, and, from case to case, deconstruction¹. The term provisioned by Directive 2014/52/UE for the transposing of its provisions into the national legislation was the 16th of May 2017. The Project of Law regarding the evaluation of the impact of certain public and private projects on the environment is approved in 2018 by the Government, followed by its enactment². The transposing of the Directive has major implications on the Danube protection, considering that it involves more ample elements regarding the efficient and lasting using of resources, the evaluation of the significant negative effects of the projects on the biological diversity, including the marine environment with the purpose of avoiding any deterioration of the quality of the environment and of any net loss of biodiversity, including the species and marine habitats.

At the theoretical level, it is considered that an international cooperation represents the key for preventing the environment damage. This element is connected to the issue of the way in which the institutions contribute to the diminishing of the competition for natural resources and the way in which the states interact.

In “Negotiating for Water Resources: Bridging Transboundary River Basins”, Andrea Haefner (2016, p. 1), based on work in the field and on certain interviews regarding the hydrographical basins Mekong, Danube, and La Plata asserts that the cooperation in the cross-border marine basins is possible even when there are asymmetrical power relations. Major challenges remain to be the conciliation of the interests of conservation with those of economic development.

In general, the national legal context regarding the Danube protection evolved under the pressure of international dispositions. In the first decade after 2000 the adopted normative acts contain provisions that underline the protection and ecological reconstruction. After 2010, the laws that expressly regard the Danube River and the Danube Delta contain measures destined to the economic-social development. The object of the laws adopted during 2010-2017 regard the passing of certain real estates afferent to the marine infrastructure from the public domain of the state to the public domain of the counties³, these measures being destined to the economic-social development of the Danube Delta area⁴, financial measures in the field of the multiannual programs that have environmental priority and for the waters

¹ Exposition of motives, the project of law regarding the evaluation of the impact of certain public and private projects on the environment.

² <http://www.mmediu.ro/app/webroot/uploads/files/2018-05-10-comunicat%20transpunerea%20Directivei%20EIA%20.pdf>.

³ Law no. 176 of the 18th of July 2017 regarding the transmitting of real estates afferent to the marine infrastructure from the public domain of the state and the administration of the Transport Ministry under the concession of the National Company “The administration of the marine Danube ports” - S.A. Galați to the public domain of Tulcea county.

⁴ Law no. 216 of the 2nd of July 2013 regarding the approval of Emergency Ordinance of the Government no. 127/2010 for the adoption of measures destined to the economical-social development of the area Danube Delta.

administration¹. Pretty frequently, the Reservation of the Biosphere Danube Delta came to the attention of the legislator. Law no. 82/1993 regarding the establishment of Reservation of the Biosphere Danube Delta was changed at least 3 times (2013, 2014, 2015). By Emergency Ordinance no. 50/30.06.2017, the Administration of the Reservation of the Biosphere Danube Delta is passed from the subordination of the Ministry of the Environment to the subordination of the General Office of the Government. On the one hand, the change is considered positive as long as it leaves the protection of one Ministry and on the other hand this change opposes certain engagements and environmental conventions².

One legal initiative having a major impact on the Danube Delta, implicitly the Danube River, is the “Project of Law regarding certain measures having a monetary derogatory regime that can be applied to certain fields, constructions edified on these, and certain economic authorized activities” registered by the Upper Chamber under no. L123/2017, and by the Lower House under PL-x nr. 453/2017. The project of law encourages through monetary advantages constructions in the islands, water meadows, and other dry surfaces located in areas where the flooding risk is high. The active organizations in the field of the protection of the environment³ requests the Lower Chamber to reject the legal proposition, arguing that the application of such a law will lead to the raise of the risk of producing economic damage and even people might lose their lives in the case of flooding. Meanwhile, this project of law would turn the Reservation of the Biosphere of the Danube Delta, a site included in the UNESCO patrimony, as well as other natural areas protected in Romania, into commercial and entertainment areas without considering the protection of the unique natural values of Europe. The tax remission for the economic activities that are linked to the “production of renewable energy, tourism, entertainment, public alimentation, en detail trading, gambling, as well as those of associated services”, mentioned by Article 7 of the legislative proposition, will have a major negative impact on nature.

The representatives of the Association Save the Danube River and the Delta and of WWF consider that the major challenge in the administration of the Danube Delta is the conciliation of the interests of conservation with those of economic development. In the reservation of the Biosphere Danube Delta there is a complicated structure that makes the very collaboration with the local authorities responsible of the administration of the Delta hard. The solutions to the problems that the Danube Delta still encounters have to be the consequence of a common perspective of conciliation

¹ Law no. 251 of 19th of July 2013 regarding the approving of the Governmental Ordinance no. 3/2013 for the regulation of financial measures in the field of the multiannual priority programs for the environment and water administration.

² <http://www.obiectivtulcea.ro/trecerea-arbdd-in-subordinea-directa-a-guvernului-provoaca-reactii-pro-si-contra-la-tulcea/>

³ See http://www.wwf.ro/resurse/comunicate_de_presa/?uNewsID=317530.

between the interests of conservation and the economic ones, accepted and sustained by all the factors of interest¹.

The ecological reconstruction, intense fishing, and poaching, the chaotic development of tourism in the past years, the channeling systems and damaged sewage plants represent higher and higher threats against the biodiversity of the Delta (Bloech, 2017). Although they represent a major objective of the Plan of Management of the Administration of the Reservation of the Biosphere Danube Delta, the ecological reconstruction of the damaged nonproductive areas cannot be realized because of the divergent interests of the local institutions, but also because of the situation of the estates or the bad concessions. Turning the beaches and especially Chituc water meadow into touristic equipped resorts has a major impact on the habitats of the marine beaches that are unique in Europe.

Such housing plans for the setting up of touristic resorts breaks the provisions of the Directives of the EU regarding the conservation of biodiversity, as well as the status of reservation of the biosphere, a UNESCO patrimony. Otherwise, the European Commission recently requested Romania to handle the inappropriate aspects of the environmental protection in Sulina area and the Danube Delta, as the Commission is interested by the bad procedures of evaluation of the potential impact of the development of tourism in this area that is part of the European network of protected areas Nature 2000².

Conclusions

The legal solutions/answers regarding the protection of the Danube are the consequences of two important conventions: the Convention regarding the navigation regime on the Danube (Beograd, 1948) and the Convention regarding the protection of the Danube River (Sofia, 1994). The very specific character if these does not reverse and does not detain the holistic approach of the issues having a social-economical character of the Danube basin. By their nature and content, the Conventions are legal documents less compelling, as they describe desirable obligations and not obligations of result and behaviour. More flexible and pliable, these are norms intentionally written at future tense, norms about which Duguit would say that are the products of social solidarity, resulted out of the meeting between ethics and power and they allow the ensuring of the cooperation among the states, keeping its sovereignty intact³. They are included in the national legislation by means of framework laws, special laws, governmental ordinances, orders,

¹http://www.wwf.ro/ce_facem/dunrea_i_delta_dunrii/proiecte_finalizate/expozitie_foto_delta_dunarii/

²http://www.wwf.ro/ce_facem/dunrea_i_delta_dunrii/proiecte_finalizate/expozitie_foto_delta_dunarii/

³ Reviving the Danube, <https://www.thegef.org/news/reviving-danube>.

decisions, norms, instructions, and standards. Under the reference of content a utilitarian approach turning into a holistic approach can be noticed, but the putting into practice is generally a challenge caused by the lack of planning, coordination, and of adequate financing. Asymmetries related to power and social-economic interests affect the coherence of the legal context.

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