THE ADMINISTRATIVE CONTRACT REGULATED BY THE ENVIRONMENTAL LAW

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Abstract

The study offers an integrated, multidisciplinary research and approach of the adhesion contract/standard contract, as regulated by the administrative law and environmental law. It offers both a synthesis of the creation and evolution of this contract in the administrative law, being then acquired by a more recent branch of law – the environmental law. It analyzes the actual ramifications and utility of the adhesion contract in environmental law, both on national and European level. In this respect, several legal tools are mentioned (such as the environmental regulatory approvals, the compliance programs, the eco-labels, the environmental management and audit). The main goals assumed by this study envisage, on one hand, to clarify some aspects that are equally important and useful for a contractual practice regulated by the environmental law. On the other hand, it underlines the necessity to extend these legal tools in the Romanian legal system, based on European regulations and the practice of other countries where, on a larger scale, unilateral regulations issued by the State are replaced by contractual tools and norms.

Keywords: *administrative and environmental standard, adhesion contracts, eco-labels, compliance programs, eco-management, European environmental law.*

JEL Classification: K12, K15, K23, K32, Q52

1. Introduction. Main sociological approach of the contract

1.1. From a historical perspective, the contract has been probably the oldest figure defined by the law and definitely the most popular/used one, starting, for example, with the sale contracts or the exchange contracts and continuing with the marital consensus, followed by the contracts concluded by the public power on a national level as well as international treaties or conventions, in order to regulate the relations between different countries.

From a sociological-juridical perspective, the well-known essayist J.-J. Rousseau imagines even the assumption of a project of a contract that could exist in a period of time before the naissance of the legislative norms, named "state of nature". J.-J. Rousseau thought that during the respective primary age of the history of humanity, when the free will of individuals plenary appeared, the consequence was that the conventions between them could not be followed by concrete sanctions. This is why, in the respective case, a "haunting expedition" agreed by some occasional associates could not take place finally, because one of them abandoned it without any legal consequences[2]. The failure appeared mainly in the absence of *juris vinculum*, the liaison of law, as a fundamental element of a contract, from a juridical point of view.

1.2. As a social value, before being an utile juridical institution/norm, the contract represented a special moment in the mankind' civilization history, as a real *cultural act* that deeply influenced its millenary history. “Beyond any doubt, when man, inspired by his needs for a more reasonable way of existence, became persuaded that he might obtain something from his fellow, not by force, but offering something as a counterpart, the humanity in itself made a huge progress, being probably the most important temptation to substitute the violence between human beings with the agreement of parties[3]".

In this social fact mentioned by the ancient history of the humanity we may find probably the first proof of an implicit recognition of *someone's rights to be and to have (something)* - these two rights being the most important ones - and, in the same time, we will find the mutual

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[2] J.-J.Rousseau, *Discurs asupra inegalităţii dintre oameni*, Ed. Stiinţifică, Bucharest, 1958, p. 122.

[3] S.-M. Teodoroiu, *Elemente de drept civil. Noţiuni generale, principii. Persoane şi bunuri. Obligaţii civile şi contracte speciale. Răspunderea civilă,* Ed. C.H. Beck, Bucharest., 2012, p. 192.

acknowledgement of the *humanity's right to exist*[4].

This "contractual" theory has been extended step by step to the relations between countries, by concluding various types of international conventions or treaties, from the very old history. Also, it penetrated the political ideology, as an assumption of an original *social contract* grounding the entire existence of the society and of the state, as described initially by Platon and Lucretius, followed by Th. Hobbes, J. Locke, J.-J. Rousseau, J. Rawls.

2. The adhesion contract/standard contract - the main contractual "tool" used by the environmental law

2.1. In a more and more standardized world, the contract of adhesion/standard contract tends to occupy a large place in the practice of bilateral juridical acts. Indeed, simplifying the way the agreement is reached through the presentation of the offer as a draft contract followed by its conclusion - mainly without negotiations, but through the expression of adhesion of the other party - signifies a very utile modality to operate with it.

In this manner, the contract of adhesion becomes a juridical necessity generated by the mass production and distribution of products, being present in the current commercial operations of individuals and groups and being, in fact, the most frequent juridical act in the social practice: anywhere we find goods or merchandise presented with the price label, it signifies the offer to conclude a contract of adhesion.

According with art.1175 of the Civil Code of Romania, we are in the presence of a contract of adhesion when its essential clauses are required or drafted by one of the parties of the contract for itself or following its instructions, the other party having no possibilities to negotiate them, but only to accept them as they are.

Although the doctrine considers that it may be difficult to produce a definition of this type of contract, the Civil Code tents to expressly draft it, even its formulation is still perfectible.

2.2. The legal definition adequately underlines that the contract of adhesion does not include even formally the equal position of parties not even on a formal level; this is the reason why the contract of adhesion becomes an useful tool inside the large area of the administrative contracts, including those pertaining to environmental protection - where asymmetric legal relationships are obvious and it results from the juridical position of the public authority (in its position of bidder/offeror). This position is reflected also in the contractual area.

In the contemporary doctrine, it is openly recognized the un-equal position of the parties of various contracts, as a general characteristic of the respective contract; this state of facts undermines sometimes the principle of free will(volition)/autonomy of will - as a fundament of the "consensualism" of the bilateral juridical acts. In this way, "*contemporary aspects of the un-equality of parties* mix with the *standardization of contracts* in order to produce a new type of contractual relationships[5]." As a matter of principle, the exclusion of the negotiation from the contracts of adhesion offers the bidder a privileged position in the respective contractual relationship. But we are not in the presence of an absolute exclusion of the negotiations: it refers only to its essential clauses which represents implicitly the fact that some un-essential clauses may be negotiated by the parties, or the fact that the acceptor may pretend some specific clauses to be introduced in the contract.

2.3. As any other administrative contract, the contract of adhesion in the environmental law includes at least two parts, different from one another compared to their importance, as follows: the offer, which is an unilateral administrative act, frequently named "bidding document" and eventually a more reduced part, agreed together by the parties, regarding the less important clauses of the contract[6].

Consequently, being a *mixt juridical act*, in whose structure the main part is represented by

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[4] *Ibidem*.

[5] J.Ghestin, *Traite de droit civil. La formation du contrat*, L.G.D.J, Paris, 1993, p. 45 par. 63.

[6] On clauses in administrative contracts see C.-S. Săraru, *Contractele administrative. Reglementare. Doctrină. Jurisprudență*, Ed. C.H. Beck, Bucharest, 2009, p. 240-245.

the administrative unilateral act, the administrative contract of adhesion belongs to the contracts regulated by the public law. Its content is entirely (or almost entirely) generated or imposed by the respective public authority. Considering the fact that the other party/person does not take part in the drafting process of the main version of the contract, he/she keeps a secondary role or position when the contract is concluded - and this is specific to this type of bilateral juridical acts[7].

Within this typology, the contract of adhesion is different from other types of contracts not exactly through its object - that may be represented by a large diversity of facts, but mainly through the *modality* or *way of concluding it.* A pure and simple adhesion does exist not only when dealing with merchandise or goods having displayed prices - through manifested will of buying and paying the price - but also when the offer is presented as a *draft pre-formulated (already formulated) standard contract or model contract,* often used in the area of public services, locations etc.

The administrative contracts of adhesion may be used for various matters, some of them being essential and frequent, for example, those laid down in art. 2 par. (1) point c)[1] of the Law no.554/2004 of the contentious administrative[8], such as: making the most of public goods (goods belonging to public property), caring out public works, providing public services, public tenders or acquisitions. From this perspective, these legal provisions are applicable in the environmental law, too; the conclusion is grounded also on the idea that this recent branch of law (the environmental law) has been developed from the administrative law, together with the increasing concerns of the public powers regarding the protection of the environment, both on national and international level. This is why the theoretical aspects of the environmental law, especially those referring to its juridical acts, follow the models and structures offered by the administrative law.

2.4. The protection of the environment, as a general policy regarding the nature and its resources, has been developed almost exclusively by the state and the local communities, through peremptory-punitive measures, which have created, during the time, a clear *regime of the police of the environment*, preserving almost exclusively the legal norms issued by the public power.

Based on these approaches, the implementation of a "*contractual vision*" in this matter does not enjoy too many perspectives, and this could be a reason why the legislator does not consider it a priority, yet. In this respect, the framework law - the Governmental Emergency Ordinance (GEO) no. 195/2005 on the protection of the environment[9]- does not offer any possibility to eventually regulate the contracts between the public power or authorities and various entities in the society - especially individuals and/or legal persons (entities); it's the same situation with the contracts between regional and/or local communities or even between individuals only. In the same time, the respective legal norms do not exclude a certain contractual practice and, in this sense, it indefinitely refers to "conventions concluded between public authorities and individuals and/or legal persons regarding the goals of the environmental protection" [art.2 point 38 letter c) of the GEO no.195/2005].

The law does not specify which is the legal area/sphere of the "goals of the environmental protection"; it only generally refers to the fact that the protection of the environment represents a "goal of major public interest" [art.1, paragraph (1)]. Implicit, these "environmental protection goals" result from the legal definition of the *environment* in itself, as follows: "the overall conditions and natural elements of the Earth, meaning: the air, the water, the soil, the subsoil, the characteristic aspects of the landscape, all stratum of the atmosphere, all organic and inorganic materials and also the living beings, the interaction of the natural systems, including all the above-mentioned elements, including specific material and spiritual values, quality of life and conditions that may influence the health and well-being of the population" [art.1 para. (2) of the GEO no.195/2005].

The legal definition of the environment is somehow audacious, considering the fact that the legislator shall make an option between at least two approaches: an exhaustive one, that may be un-useful, due to the fact that environment represents everything that surrounds us, or an analytical-

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[7] See *in extenso* S.-M. Teodoroiu, *Dreptul mediului şi dezvoltării durabile,* Ed. Universul Juridic, Bucharest, 2009, p. 118 et seq.

[8] Published in the Official Journal of Romania, part I, no.1154 of 7 December 2004, as modified.

[9] GEO no. 195 of 22 December 2005 regarding the protection of the environment (published in the Official Journal of Romania, part I, no. 1196 of 30 December 2005), approved by the Law no.265/2006 (published in the Official Journal of Romania, part I, no. 586 of 6 July 2006), as modified.

selective approach, but this one will be probably an un-complete one. In order to surpass this dilemma, a version of the legal definition of the environment was imagined, with an indicative-operational scope: it has an indicative character, because it sums-up some basic elements, and it is an operational one, because its goal is to create a certain legislative framework to support the current activity of the law enforcement agencies and bodies. These aspects have at least a theoretically importance, especially because the *parties (subjects)* of the environmental legal contracts are mentioned, as well as *the objects of the respective legal torts (obligations)* in this matter.

2.4.1. When referring to the goals of the protection of the environment, *the subjects (parties) of the conventions* may be those of the administrative contracts[10] (no matter if they are contracts of adhesion or contracts negotiated between parties); they are concluded between public authorities and legal persons or individuals.

In this respect, this type of contracts accomplishes also the scope of transposing *the principle of administrative decentralization*, that do not refer only to aspects regulated by the law, but they also may be fulfilled through the extension of the contractual policy, according to the law.

In this context, the contracts between state's public authorities may be applicable, especially those between the central authority/body for the environmental protection and the local authorities, regarding the urban or rural management of the environment (green areas, parks, urban landscape etc.), large custodies of waters, lakes, protected areas and sensitive areas etc. The advantages of this type of contracts cannot be neglected due to the fact that, on one hand, the respective communities obtain financial and/or logistic support and, on the other hand, the state authorities may oversee more efficiently the funds management and budgetary control in the respective areas. Various contracts dealing with the environmental planning schemes could be concluded between local/regional communities, represented by the respective public authorities.

The contracts on waste recycling have a certain importance when discussing about the protection of the environment; they may be concluded between legal persons (named *notifier and receiver).* They are regulated by the European law [for ex., the Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste[11]]. According to the European regulations, **it is mandatory** to conclude a contract of waste recycling, after obtaining the necessary authorization and, eventually, import-export licenses issued by the competent public authorities.

2.4.2. A specific theoretical aspect is to be underlined, referring to contract' structure as a whole; this aspect becomes significant within the entire typology of the administrative contracts, meaning the object of the contract.

Initially, the "classical" doctrine mentioned that any type of contract had an object; nowadays, we may underline the idea that the contract does not have exactly an object or at least we may observe that its objects results from the description of the juridical act regulated by the contract: real estate, buying/selling, rents etc. Also, the contemporary doctrine insists on the idea that only the *obligation* has an object, meaning the performance assumed by each party of the contract[12]. Taking into account these new theories, the new Civil Code of Romania stipulates the same ideas in art.1225 and 1226, as follows: "the object of the contract means the juridical operation such as real estate, buying/selling, rent, loans etc., decided by the parties, as it is observed from the entire rights and obligations stipulated in the contract" [art. 1225, par. (1)].

"The object of the obligation is determined by the performance assumed by the debtor" [art. 1226, par. (1)], considering the fact that each party plays the roles of both creditor and debtor in relation with the other party. Consequently, the contracts regulated by the environmental law shall made this distinction between the object of the contract and the object of the obligation of each party. Also, we may observe that these contracts have both a *generic object* and a *specific object.*

The generic object is mentioned by the contracts similar to those regulated by art. 2 par. (1) point c)[1] of the Law no.554/2004 of the contentious administrative, as follows: making the most of

[10] On the parts of the administrative contract see C.-S. Săraru, *op. cit.*, 2009, p. 185-222.
[11] Published in the Official Journal of the European Union L190/1 (12.07.2006).
[12] Ph.Malaurie, L. Aynes, *Droit civil. Les obligations*, Ed.Cujas, Paris, 1992, p. 259; J. Ghestin, *op.cit.*, p. 654.

public goods (goods belonging to public property), caring out public works, providing public services, public tenders or acquisitions. Meanwhile, a *specific or concrete object* may be observed. If these contracts refer to rural or urban environmental planning schemes - as a specific object -, they are included also in the category of the contracts referring to works of public interest, considering their generic object.

Also, the respective contracts may be analyzed considering the *object of the obligations*, meaning the effective performances of each party (works, payments etc.). This type of distinctions regarding the object of the contract and the object of the obligation of each party are necessary and useful to characterize the contracts and their effects or to determine the competent jurisdiction to solve potential conflicts/litigation between parties.

2.4.3. The framework law on the protection of the environment (GEO no. 195/2005) mentions the following: the competent authority for the protection of the environment establishes together with the owner of the activity, *the compliance program*, based on the conclusions and recommendations of the environmental audit [art. 12, par. (5)]. It is to be determined if the compliance program may be seen as an unilateral administrative act or an administrative contract regulated by the environmental law.

First, it is to be mentioned that the compliance program is drafted on the basis of the environmental audit. The "environmental audit" is defined as following: a work/paperwork drafted by individuals or legal persons who have this legal capability or prerogative, in order to obtain the environmental permit.

Considering its content, the environmental audit means the analysis and technical evaluation of the reasons and consequences of the combined negative effects of the respective activity in order to quantify the effective impact on the environment pertaining to a specific site. If a major impact is determined, the environmental audit shall be supplemented by a "risk assessment study" (art. 2 point 14 of GEO no.195/2005).

However, with regard to "risk assessment", this is achieved through a different process of analysis of the probability and severity of the main components of the environmental impact and it establishes the need for prevention, intervention and/or remedial measures [Article 2(32) of Government Emergency Ordinance no. 195/2005].

As it can be seen, the word "process" in the abovementioned regulatory act designates what, in theory, is a preparatory operation of an administrative act, called "administrative operation" (technical-administrative operation or technical administration operation). Therefore, if a distinct legal act, like the "compliance programme", is prepared by one or several administrative operations, the logical consequence thereof would be that the respective programme is an administrative act.

However, another problem refers to whether or not it has all the characteristic features of an administrative act, as set in Article 2 (1) letter c) of Law no. 554/2004 of the contentious administrative. According to this legal definition, an administrative act means the unilateral act of an individual or regulatory nature, issued by a public authority for the purpose of enforcing or ensuring the enforcement of the law, thereby generating, modifying or extinguishing legal relationships. Also, the public authority is defined as any State body or body of the administrative-territorial units acting as a public power for the purpose of satisfying a public interest [Article 2 (1) letter b) of the same law]. It is clear from the analysis of these legal texts that, in principle, in order to be in the presence of an administrative act, certain conditions must be met, which become the form and content of this type of legal act, namely: to be unilateral, to be issued by a public authority acting as a public power and for the satisfaction of a public interest, to be issued for the purpose of enforcing or ensuring the enforcement of the law, by stating on legal relationships. It is within this framework that the respective act is drawn up by a public authority, acting as a public power, for the satisfaction of a public interest, in order to enforce the law or ensure the enforcement of the law, while also establishing concrete legal relationships.

However, with regard to the *unilateral nature* of this type of legal act, the question arises whether or not this is preserved even when the act in question does not have only one author, but two or more.

According to the classical doctrine, which dominates civil law, a unilateral act is the manifestation of a single will, while the bilateral or multilateral one represents the manifestation of two or more wills (to this effect, typical examples of unilateral legal acts are the will and the offer).

According to the current doctrine of administrative law, the criterion for identifying the unilateral nature of an (administrative) act is not a quantitative one, in terms of the number of authors or wills expressed, but the qualitative criterion of its content, expressed in the legal bond (*juris vinculum*) that it creates. To this effect, it is thus deemed unilateral the legal (administrative) act that drives not only the conduct of the authors of the respective act, but mainly the conduct of other subjects of law, third-parties to the issuance of that act (for example an order signed by two ministers remains a unilateral administrative act, although it does not have only one author, but because it firstly regulates the conduct of third parties')[13].

Consequently, the unilateral nature of the "compliance programme" cannot be questioned, even if, prior to its issuance, the competent public authority discusses with the manager of the activity, negotiations being also possible to take place.

In this regard, it is necessary to recall the category of *negotiated unilateral administrative acts*, which, in order to be prepared and issued, also undergo a stage of negotiations (such as those between different public authorities and representatives of different civil society organisations, trade unions or other legal or natural persons). However, the negotiation does not change the unilateral nature of the administrative act, which belongs to that respective authority[14].

3. The adhesion contract/standard contract in European environmental law

3.1. In *European environmental law,* of the many situations in which legal relationships are regulated by means of administrative contracts, some of the most important ones, such as the *environmental regulatory approvals, the eco-labels, the environmental management and audit,* are worth mentioning. All of these have a common feature, i.e. they are implemented through contractual procedures carried out between the public authorities and activity managers, namely through administrative contracts.

3.2. *Environmental regulatory approvals* are regulatory instruments for the transposition of the environmental policies by the competent public authorities, which become formal legal acts through the commitment obtained following negotiations with one or more activity managers, sometimes organised in associations[15].

Also called "environmental commitments", they become typical cases of joint regulation, through administrative contracts, of legal relationships concerning environmental policies, between public authorities and different activity managers. Thus, the administrative contract appears as an alternative legal instrument to the unilateral regulation by public authorities.

Being effective legal acts, the environmental regulatory approvals or commitments have existed since the 1980s in several European countries, as well as in the United States of America, in Canada, Australia and Japan, after which they were also taken over by the European environmental law through a significant number of directives, which also refer to the use of these approvals.

Thus, while the regulation of the first environmental approvals by the European Commission dates back to the late 1980s (see European Commission Recommendation 89/349 of 13 April 1989 on the reduction of chlorofluorocarbons by the aerosol industry[16]), later on this practice has increased considerably and steadily.

To this effect, these regulations also create the legal framework for the Member States of the European Union to use environmental approvals in order to transpose the directives and, for the

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[13] See R. Chapus, *Droit administratif général*, tome I, Montchrestien, Paris, 1988, p. 541; C.-S. Săraru, *Drept administrativ. Probleme fundamentale ale dreptului public*, Ed. C.H. Beck, Bucharest, 2016, p. 69, 70.

[14] R. Chapus, *op. cit.*, p. 545.

[15] Concerning the administrative nature of the voluntary environmental approvals covered by European Union legislation see C.-S. Săraru, *op. cit.*, 2009, p. 365, 366.

[16] Published in the Official Journal of the European Communities, L 144 (27.05.1989).

European Commission, to exercise some of its executive powers[17].

However, it should be noted that, in Government Emergency Ordinance no. 195/2005, the legal acts called "approvals", i.e. the *environmental regulatory approval* and the *import approval for genetically modified organisms*[18], are unilateral administrative acts, expressing only the will of the competent public authority, as a legal subject. This is why we consider that it would be useful that, in order to avoid confusion, these bilateral agreements be designated in our legislation as "environmental commitments".

3.3. *Eco-labels* are established by Regulation (EC) no. 66/2010 of 25 November 2009 on the EU Ecolabel[19] [formerly, by Regulation (EEC) no. 880/1992 of 23 March 1992[20]] and can be attributed to products and services with an environmental impact lower than that of other products or services in the same category, based on scientifically established criteria.

Labels can be awarded free of charge or in return for payment. The award must take into account the European environment protection objectives, such as the impact of those products or services on climate change, nature and biodiversity, energy and resource consumption, waste generation, emissions and release of hazardous substances in the environment, reuse of products, compliance with other social and ethical standards, such as international labour standards, etc.

The Member States of the European Union shall designate, to this effect, one or more bodies responsible for carrying out the labelling process at national level[21].

If the product complies with the labelling criteria, the competent authority, designated as such, shall sign an administrative contract with the operator, setting out the conditions of use of the label and its withdrawal, after which the operator may apply the label's "logo", i.e. the graphic symbol, on the product. For its use, certain royalties can be charged, as stipulated in the contract.

It is worth mentioning that Government Emergency Ordinance no. 195/2005 does not regulate the legal "environmental labelling" operation, which ends with a contract, but only the concept of "eco-label", meaning logo or graphic sign[22].

3.4. *Eco-audit* and *eco-management* are laid down in Regulation (EC) no. 1221/2009 of 25 November 2009 on the voluntary participation by organisations in a Community eco-management and audit scheme (EMAS)[23] (formerly, by Regulation 1836/1993[24]) on the voluntary participation of organisations in a Community eco-management and eco-audit system, which is also carried out through the signing of administrative contracts with the relevant environment protection public authorities.

4. Conclusions

The use of contractual procedures by public authorities, including through the signing of administrative contracts, in order to achieve the environment protection objectives, can undoubtedly be not just a justified temptation, but an action with a secured future. In line with the new social

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[17] See Eve Truilhe-Marengo, *Droit de l'environnement de l'Union européenne*, Larcier, Brussels, 2015, p. 80 et seq.

[18] The environmental approval is the administrative act issued by the relevant environment protection authority, which establishes the conditions and, where appropriate, the environmental protection measures to be observed in case a project is carried out [Article 2 (3) of Government Emergency Ordinance no. 195/2005], and the import approval for genetically modified organisms is defined as the administrative act issued by the relevant environment protection authority, which entitles the manager to import genetically modified organisms/microorganisms and sets out the conditions under which it may be carried out, according to the law [Article 2(4) of Government Emergency Ordinance no. 195/2005].

[19] Published in the Official Journal of the European Union L27/1 of 30.01.2010.

[20] Council Regulation (EEC) no. 880/92 of 23 March 1992 on a Community eco-label award scheme, published in the Official Journal of the European Communities L 99/1 of 11.04.1992.

[21] See Eve Truilhe-Marengo, *op. cit.*, p. 89.

[22] "Eco-label" means a graphic symbol and/or a short descriptive text affixed to the packaging, in a brochure or other informative document accompanying the product and providing information on at least one and at most three types of environmental impact [Article 2 (29) of Government Emergency Ordinance no. 195/2005].

[23] Published in the Official Journal of the European Union 342 L (22.12.2009). It repealed Regulation (EC) no. 761/2001 and the Commission decisions nos. 2001/681/EC and 2006/193/EC.

[24] Council Regulation (EEC) no.1836/93 of 29 June 1993 allowing voluntary participation by companies in the industrial sector in a Community eco-management and audit scheme, published in the Official Journal of the European Communities, L 168/1 (10.07.1993).

realities, it is rather sought to obtain the consent of the addressees of the legal norms, who thus become partners in their application, instead of imposing them through coercive means or by threatening their addressees and by treating them as opponents. After all, as Goethe wrote, "all laws are attempts to bring us closer to the intentions of the moral order of the world in the flow of time and life[25]".

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[25] J. W. Goethe, "Iphigenia in Tauris", p. 831.