



## Legal Liability in Environmental Law

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**Abstract:** As a member of the European Union and of other regional and world organizations responsible for global environmental protection, Romania has adopted internally a set of measures aimed at protecting the environment. In this paper we conducted a general review of the developments of the way of legal defense of the most important environmental values at international and national level, with an emphasis on internal legal rules. We also examined briefly the civil, administrative, and criminal liability of individual and legal entity that violates the current environmental laws. Our research regards the means by which there are protected by the rules of law the main values of the environment, by examination and critical remarks. The results of the research presented at the conclusions, highlight the need to harmonize the national legislation with the European one and the need to amend and supplement the New Criminal Code with a special chapter covering major environmental offenses. The study is useful for those who carry out their activity in this domain, especially professors and students of the law faculty.

**Keywords:** legal protection; offense; civil law; criminal law

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## 1. Introduction

There have been in Romania since the XV<sup>th</sup> century concerns on environmental protection, including statutes adopted by the lords of that time, such as the laws of Stephen the Great/ Ștefan cel Mare - forest reserve law – a forbidden place, a place where no one was allowed to hunt, to pasture cattle, to fish or to hay, mow without the owner's will. Subsequently there were reported acts of Vlad Vintilă's reign from 1533 and Ștefan Tomșa of 1621 governing also the legal position of *reservations* (Negruț, 2008, p. 18). Over time, there was an increase in legislators' concerns of ensuring a healthy environment, the first law to protect the natural monuments appeared quite late, namely in 1930, the law being completed in 1932. (Negruț, 2008, p. 20)

Worldwide, in the last years due to global industrial development and the risks of becoming more and more environmental damage, the first measures were established by two regional organizations (Council of Europe and the Organization of African Unity) and then the United Nations organization.

The specialized literature points out that in the early 1968 the “Council of Europe adopted the first two texts as proclaimed by an international organization of environmental protection: *the Declaration on the fight against air pollution (8 March 1968, Resolution no (68) 4 of the Committee of Ministers)* and the *European Charter of Water* (proclaimed on May 6, 1968). That same year, the organization in Strasbourg adopted also the first of European environmental treaties, namely the *European Agreement on the limitation of the use of detergents in washing and cleaning products*, signed on 16 September 1968”. (Duțu, 2008, p. 15)

In the same year, on 15<sup>th</sup> September, the Heads of State and Government Members of the Organization of African Unity “have signed *the African Convention on the preservation of nature and natural resources* (which succeeded the London Convention of 1933, occurred mainly between the colonizing countries and it was completely amended by the convention on the same subject in 2003). The document is distinguished by its global feature, referring to the preservation and use of land, water, flora and fauna resources, virtually all environmental factors” (Duțu, 2008, p. 15). At global level, the first UN Conference on Environment was held in Stockholm from 5 to 16 June, 1972.

Regarding the concrete results of this conference, in our doctrine it was considered that it was “approved a large number of texts, including a general statement, adopted by acclamations, 109 recommendations that was an *Action Plan* and a resolution on institutional and financial provisions recommended by the World Organization.” (Duțu, 2008, p. 17)

The most important adopted document is without a doubt the *Declaration of United Nations Conference on Environment (Stockholm Declaration)*, a document which

states in its preamble seven points and 26 general principles. Subsequently, according to the industrial development, at global level, the UN organized two more conferences that is in Rio de Janeiro, June 1992 and in Johannesburg, September 2002 and at regional level there were adopted numerous documents, at EU level there was even a decision by which the environment is protected through criminal law.

In our current legislation, the environment is defined as a set of conditions and natural elements of the Earth, being included the air, water, soil, subsoil, landscape features, all atmospheric layers, all organic and inorganic materials and living things, natural interaction systems, including the items listed above, including some material and spiritual values, quality of life and conditions that may affect the welfare, and human health.

## **2. The Environment Protection, a Public Interest Objective**

The protection of fundamental rights of legal or physical individuals represents an obligation of the state, which is reflected in specific legal rules, structured in relation to their importance.

One of the most important rights guaranteed and protected by the State is entitled the *right to a healthy environment* which is provided in the Constitution as well. According to constitutional provisions, the state recognizes everyone's right to a healthy and ecologically balanced environment, while providing the legal framework for exercising this right.<sup>1</sup> Meanwhile, on the country's territory, the duty to protect and improve the environment belongs to both natural and legal persons.

In the context of current legal regulations, including the constitutional ones, in the specialized literature it has been argued that the right to a healthy environment "means both the fulfillment of obligations relating to environmental protection. Therefore, the states have a general obligation to take the legal, administrative and other *measures* necessary to ensure the right to a healthy environment. These measures should aim at preventing the environmental degradation, establishing the necessary remedies for environmental degradation and regulation of sustainable use of resources. To these obligations of the state it should be added also a series of special *procedural guarantees* that provides also a procedural dimension. (Anghel, 2010, p. 9-10)

Referring further to the right, the quoted author shows that "there can be identified *an individual dimension*, involving the right and obligation of each individual to prevent pollution, to cease any activity that causes pollution and repair the damage

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<sup>1</sup> The Romanian Constitution, article 35 paragraph (1) and (2).

caused by this pollution, and a *collective dimension*, involving the obligation of states to cooperate in preventing and combating pollution, in order to protect the environment”. (Anghel, 2010, p. 10)

According to the provisions of the framework law<sup>1</sup>, the environmental protection is an objective of major public interest, a situation in which the legal rules governing this area have a particular priority in relation to other similar rules that refer to other social areas.

Based on these provisions, without having provided a unified judicial practice, the courts in the country, have adopted a series of rulings that have given priority to the public interest represented by the environmental protection in relation to territorial-administrative units' interests.

Thus, in applying these rules, the High Court of Cassation and Justice held that “being clearly established that the land in question is part of the national forest fund and it was administered continuously by NFA - Romsilva, the first court concluded correctly that the contested Government decision was adopted in violation of these laws and “disregarded the interest of the environment that prevails in relation to the territorial-administrative unit consisting of an alleged campus building (sub. recognition).”<sup>2</sup>

Similarly, another court “having compared between public interest, represented by environmental protection and administration interests, the court gave priority to environmental protection. The court<sup>3</sup> held that “the technical expertise confirms the land ownership, continuous and uninterrupted, to the forest fund, the public property of the state under the form of forest management plans, the transmission of land in the administration of the Ministry of National Defense, by Order no. 92/1957, had no temporary feature administration in terms of administrating the agricultural real estate, which remains still in the care of the applicant.”

However, it was also noted (...) *that the forest in this case has the special protective function*, according to Moreni Forestry records, and its deforestation, in order to build a campus is not beneficial, according to article 54 of Forest Code<sup>4</sup> the reduction of publicly owned forest area is prohibited.” (Anghel, 2010, p. 11)

Thus, by observing the current legal provisions which stipulate that the environmental protection is an objective of public interest, we find that the

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<sup>1</sup> Government Emergency Ordinance no. 195/2005 on environmental protection, published in the Official Monitor, Part I, no. 586 of 6 July 2006, art. 1.

<sup>2</sup> High Court of Cassation and Justice, Department of Administrative and Fiscal Decision no 4431 of 2 December 2008, published on [www.scj.ro](http://www.scj.ro).

<sup>3</sup> Ploiesti Court of Appeal - Commercial Section, Administrative and Tax, Civil Sentence no. 62 of March 4, 2008, unpublished.

<sup>4</sup> Law no. 26/1996 on Forest Code was repealed by Law no. 46/2008, published in the Official Monitor, Part I, no. 238 of 27 March 2008.

decisions of courts of different degrees merely protect the environment and local community members right to a healthy environment.

### **3. Legal Liability in Environmental Law**

Environmental Protection and the most important values cannot be achieved except through domain-specific rules of law.

The importance of the environment caused, including the constitutional legislator, the adoption of provisions on the right of individuals to ensure a healthy and ecologically balanced environment.<sup>1</sup>

In the legal specialized literature it was sustained that “the development of the concept of public order allowed the integration of certain aspects of environmental safety, health and sanitation and by this the repression of noise, pollution prevention of all kinds, etc. The Law no. 137/1995 and the Government Emergency Ordinance no. 195/2005 have declared the protection of environment as being an objective of major public interest.” (Duțu, 2007, p. 511)

In this context we find that currently the environment is protected by rules of civil, administrative and criminal law, the responsibility of natural or legal persons that violated the provisions of normative acts are to be assumed in relation to the actual circumstances in which these violations were produced.

According to the provisions of environmental law<sup>2</sup>, by ecologic accident it is understood an occurrence due to unforeseen discharges / emissions of dangerous substances or preparations / pollution, in liquid, solid or gaseous form of steam or energy resulting from the operation of uncontrolled / sudden human activities, which damaged or destroyed the natural and anthropogenic ecosystems.

The same law in environmental damage is defined as the alteration of structural and physicochemical characteristics of natural and anthropogenic components of the environment, reducing biological diversity and productivity of natural and anthropogenic ecosystems, damage to environment effects on quality of life, caused mainly water, air and soil pollution, overexploitation of resources, poor management and their improper valuing, and by improper arrangement of the territory.

Regarding the liability for infringements of the environment, it is foreseen in article 95, paragraph (1) GEO no. 195/2005, which stipulates that the liability for environmental damage have an objective feature, regardless of fault, and in case of multiple authors, the liability is solidary.

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<sup>1</sup> The Romanian Constitution, art. 35.

<sup>2</sup> Government Emergency Ordinance no. 195/2005, as amended and supplemented, published in the Official Monitor, Part I, no. 586 of 6 July 2006, article 2, point 1.

In paragraph (2) it is indicated that *exceptionally, the liability may be subjective for the damages of protected species and natural habitats, according to specific regulations.*

In order to avoid some interpretations that are not in accordance with his will, the legislator has defined also the notion of damage, which *has measurable effect in costs of the damage on human health, property or the environment, caused by pollutants, harmful activities or disasters.*<sup>1</sup>

### **3.1. Liability Contravention**

The normative framework act provides several categories of offenses, differentiated in terms of their quantum, depending on the active subject, that is person or entity.

Thus, a first finding consists of monetary penalty which is greater as the quantum for the legal person in relation to the individual. The appreciation of the legislator is just, in our opinion, as it was intended to prevent and at the same time sanction the legal persons with greater possibilities of pollution in relation to individuals.

The second finding is that the monetary penalties provided for are higher than those in other legal norms.

According to the provisions of article 96 of the normative act framework, the contraventions are staggered into three main groups, in the order of their severity for each group, the sanctions are differentiated by the quality of the active subject, person or entity, and the quantum provided being differentiated as well, with larger sanctions for legal persons.

The first group is referred to in paragraph (1), where there are listed 22 contravention violations, punishable by fines between 3000 and 6000 lei for natural persons and 25,000 lei and 50,000 lei for legal persons. In paragraph (2) there are provided for 34 contravention violations that are punishable by fines of between 5,000 lei and 10,000 lei for natural persons and 30,000 lei and 60 000 lei for legal persons.

The third group includes 17 sanctions and there are provided in paragraph (3) fines between 7500 and 15,000 lei for natural persons and 50,000 lei and 100 000 lei for legal persons. Regarding the active subject, it might be a natural or legal person, providing that it is necessary to meet the general conditions required by law. The passive subject is often a community, or a single individual, and sometimes, in rare cases, a legal person.

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<sup>1</sup> Government Emergency Ordinance no. 195/2005, art. 2 points 52.

Finding and applying sanctions procedure does not differ with respect to common law, the legal framework being applicable to the act of governing this activity. The causes that remove the contravention character of the offense are also the general ones.

### **3.2. Tort Liability**

In a direct reference to civil liability in environmental law, in our doctrine it was sustained that “before the entering into force of Law no. 137/1995, under general rules on tort liability contained in article 988 et seq. of the Civil Code, there have relied on several basis of liability for the damage to the environment: fault, the responsibility of the committee for the act of the suspected, abuse of rights, neighborhood and abnormal disturbances, and especially, liability without fault for the act of the thing. Regarding the latter, the legal literature of our country considered that in the absence of specific environmental regulations, the liability for prejudice caused by things was the common law in the matter.

Consequently, in those situations in which environmental pollution occurred, and the resulted prejudice case could not be identified by a violation of the provisions of special legislation (Law no. 9 / 1973, Law no. 61/1974) on the legal basis of liability, it should be found in article 1000, paragraph (1) of the Civil Code

In the favor of such a position it will be invoked also the fact that, always, the environmental pollution is achieved by one thing (or by one energy), and according to a decision of the supreme court in 1953, by a thing it is understood as any material form, including energy. However, we believe that, in principle, tort liability for environmental damage can rarely find its foundation in the nature of the thing”. (Duțu, 2007, pp. 517-518)

In the legal specialized literature it was sustained the argument that by adopting the Law no. 137/1995 “there were brought important regulations for environmental damage liability. Thus abandoning the classic civil liability regime established by article 998 and the following of the Civil Code, this law established by article 81, two basic principles of tort liability: objective responsibility, independent of fault and solidary liability, in the case of plurality of authors.

In this way there was achieved an adaptation of civil liability institution to the specific of environmental issues, for the purposes of meeting the requirements of the fundamental principle of “the polluter pays” principle, established expressly for the first time in our law, by article 3 letter d) of Law no. 137/1995.

Also, there is ensured a greater protection for the victim of ecological damage, by graduating its burden of proving the fault of the perpetrator and increase the possibility of repairing the damage, by the consecration of solidary liability in the case of multiple authors prejudice (Negruț, 2008, p. 183). In the same sense it is

sustained that “as you can see, it is primarily about an adaptation of tort liability institution to the specific of environmental issues, for the purpose of meeting the requirements of fundamental principles of precaution and “the polluter pays “.

Then, it is ensured, at the same time, a greater protection for the victim of ecological prejudice through its graduation from the burden of proving the fault of the perpetrator and increase the possibility of damages by the consecration of solidary liability in case of multiple authors prejudice. Statutory regulations state fully that “liability for environmental damage” represents a repair in the modern sense rather than a liability in the classical sense, given that its substance, the author's subjective attitude, is left out of the liability conditions and thereby eliminated its preventive function.” (Duțu, 2007, pp. 520-521)

In terms of objective liability, independent of the guilt, the cited author shows that “the victim will have to prove only the existence of prejudice and causality between act and damage. This eliminates the sample fault obstacle, particularly difficult in ecological investigations, because they presume the discovery and identification of the precise source of damage, including some cooperation of the polluter. In another train of thoughts, as the evidence of guilt becomes unnecessary, in order to be liable, from now on, ensuring environmental quality no longer belongs to obligations middle class, but it becomes one of the results. So the end result will be of interest, protection and the environment quality, not only the diligence exercised for avoiding pollution or environmental degradation”. (Duțu, 2007, p. 522)

On the solidary liability in case of multiple authors, in the doctrine it was sustained that “through article 95, paragraph (1) of Emergency Ordinance no. 195/2005, it is introduced in the Romanian legal system the fifth case of passive solidarity in terms of legal obligations and, unlike the cases provided for in article 1003 Civil Code, when the “crime or quasi felony” must be attributable to more people, in the case of ecological damage, its co-authors are solidary liable, regardless of fault, objectively, in relation to the victim. This means that the victim may proceed against any of the authors to repair the total damage, and he remains to turn against the others, where the obligation becomes divisible.” (Duțu, 2007, p. 522)

The precautionary principle and objective liability concerns “decision-making orientation, constituting the principle of procedure, which requires the compliance with the precautionary approach in the presence of uncertain risk of a legitimate doubt on a potential risk. These precautions require, for example, the adoption of confrontation procedures of competing interests or the production of knowledge on the risk while developing creative activity which may also be risks. Hence, the risk of slipping towards responsibility is evident. Therefore, even if the precautionary principle is not a principle of responsibility, the judge will be naturally inclined to consider the liability by reference to the precautions that he has taken or abandoned to adopt. In this context, we might see the acceptance of guilt liability, as the judge



cannot ignore the liability of positive prescription of prevention measures. Only such a position would contradict the rules already stated by the jurisprudence and even by the positive law.” (Duțu, 2007, pp. 522-523)

The same author considers that these conditions “the operator is acting under a double constraint: on the one hand, the general interest that the administrative decision expresses and the requirements that are sanctioned by the criminal or administrative law; on the other hand, the private interests which, in their turn, are protected by engaging the liability, which may undergo an independent regime of the independent logic by the one related to the preventive measures”. (Duțu, 2007, p. 523)

In conclusion, the cited author showed that “the precautionary principle should apply only in respect of the decision process of adaptation and therefore have no impact on the liability regime” (Duțu, 2007, p. 523). Regarding the “polluter pays” principle, one can say that it expresses that the damage was caused due to the fact that pollution is always attributable to an individual or legal person that is guilty of environmental pollution.

### 3.3. Criminal Liability

Although criminal liability in environmental law has existed since the middle and in the second half of the nineteenth century, being exemplified here the German (1845), French (1879) and Spanish law (1879), however it has established with great difficulty. Across Europe the first legal document drafted was the Resolution 28/1977 of the Committee of Ministers on the contribution of criminal law in environmental protection, and the second Resolution 1 / 1990 relative to the environment through criminal law, adopted at the Conference of European Ministers Justice, in Istanbul in 1990.

The transposition of some provisions of the resolutions in internal criminal laws of European countries was achieved with difficulty, the first country being Germany, which along with the reforms of 1980 and 1987 it has introduced a special chapter in the Criminal Code. Thus in Chapter 29 entitled *Crimes against the environment*, more crimes were punishable, including: water pollution, soil pollution, air pollution, noise, producing vibrations and non-ionizing radiation etc.

By the Directive 2008/99 / EC of the European Parliament and the Council of 19 November 2008 on the protection of the environment through criminal law,<sup>1</sup> the European Union has ordered to all member states the need to ensure environmental protection at national level by rules of criminal law.

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<sup>1</sup> Published in the Official Journal of the European Union no. L 328/28 of 12.06.2008.

In the doctrine it was considered that the environmental offense “*is becoming more profitable and therefore more intense, generating at global level an annual turnover estimated between 18 and 24 billion euros, mainly by illegal storage activities of hazardous waste, trafficking and smuggling of prohibited toxic substances protected natural resources. The illicit trade in products derived from rare, endangered, species, ensures the highest profits, representing the two illegal markets in the world, after the drugs.*” (Duțu, 2007, p. 545)

Regarding the way in which the Romanian legislator sought to protect the most important environmental values through criminal law, the specialized literature has noted that “*the specific of criminal liability in environmental protection domain is determined by the nature of the object protected by law. In order to appeal to criminal liability, the committed act must have a certain degree of social risk and represent a serious threat to the interests of society in the environmental protection domain, of the use of natural resources or even threaten human life or health*” (Black, 2008, p. 189). Currently, most crimes against the environment are provided in the Government Emergency Ordinance no. 195/2005 on environmental protection, as amended and supplemented.

These offenses are listed in article 98, within four paragraphs, in the order of their seriousness. What is characteristic for all the listed 25 offenses, in this normative, the fact that what follows is a danger to society, it must be endangering the life or human, animal or vegetable health. Without finding what followed by the court, the committed acts do not meet the elements of the offenses set forth in the mentioned normative act.

The aggravated forms occur “when the offenses have endangered the health or physical condition of a large number of people, had one of the consequences referred to in article 182 of the Penal Code or had caused significant material damage or in case of death of one or more persons or serious damage to national economy. In these cases the attempt is punished by law”. (Negruț, 2008, p. 189)

After analyzing the texts that incriminate as offenses a series of acts, we consider that in relation to their subject, there “can be distinguished two categories of offenses related to environmental protection regime: first, including specific environmental incrimination and the second on general offenses, but can affect the environment”. (Duțu, 2008, p. 298)

At the same time, crimes have affected the key environmental values which can be subdivided into three main categories, namely:

- crimes whose purpose is socially dangerous which result in the destruction, degradation or causing environmental damage;
- offenses to the executing regime of activities that pose a risk to the environment, thus involving, a prior approval and following the required conditions; (Duțu, 2008, p. 299)

- the non-execution of safety measures or an administrative or criminal penalty provided for environmental protection. (Duțu, 2008, p. 299)

In order to transpose into the national law the provisions of Directive 2008/99/EC of the European Parliament and the Council of 19 November 2008 on environmental protection through criminal law, it was adopted the Law no. 101/2011 for the prevention and punishment of acts of environmental degradation.<sup>1</sup>

The internal normative act provides for a series of offenses which were not mentioned in our internal law, crimes by which there are protected certain values required to be protected by rules of criminal law across the European legislative act. The offenses listed in article 3-8, the material element of the objective side is achieved by different actions, which have different socially dangerous consequences, namely:

- the collection, transport, recovery or disposal of waste etc., which can cause death or serious injury to persons or significant damage to the environment (...);
- the export of waste by violating of the laws (...);
- operating by violating relevant laws of a facility in which a dangerous activity is carried out or where they are stored or used hazardous substances or dangerous preparations, such as to cause outside the facility death or serious injury to persons or a significant damage to the environment (...);
- trade in specimens of protected fauna or flora or with their parts or derivatives with (...);
- production, import, export, marketing or use of substances that affect the ozone layer (...);
- discharge, issuance or introduction by violating relevant laws, of material quantity of air or soil that can cause death or serious injury to persons or significant damage to the environment (...);
- discharge, issuance or introduction by violating relevant laws, of sources of ionizing radiation in air, water, soil that can cause death or serious injury to persons or significant damage to the environment (...);
- production, handling, processing, treatment, temporary or permanent storage, importation, exportation, by violating relevant laws, of dangerous radioactive nuclear materials (...).

Regarding the form of guilt, we mention that these offenses can be committed both intentionally and of negligence, but the minimum and maximum limits for the offenses listed in article 3,7 and 8 for committed crimes of negligence, are reduced by half, and the offenses referred to in article 4, 5 and 6 minimum and maximum limits for the penalty are reduced to half or a fine is applied. In the article 11-14 there are provided some depositions of the punishment of crimes of negligence.

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<sup>1</sup> Published in the Official Monitor, Part I, no. 449 of June 28, 2011.

#### 4. Conclusions

Upon the adhering to regional and global international organizations and especially the EU, Romania has assumed a series of obligations that should be met in order to insure the protection of the environment. Our research highlights the progress in recent years of our country, progress that quantifies both at legal and institutional level. At the legal level there was adopted a set of specific rules designed to protect the most important environmental values, embodied in the establishment of specific responsibilities in civil, administrative and criminal matters. At institutional level, there were created institutions that were meant to ensure the normal functioning of all economic and social activities and the control of such activities. The Framework legislative acts governing the specific activities for environmental protection are the Government Emergency Ordinance no. 195/2005, subsequently amended and supplemented and Law no. 101/2011 for the prevention and punishment of acts of environmental degradation. We believe that it is imperative to complete the new Criminal Code with a special chapter where there are incriminated the criminal facts which affect the most important environmental values.

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