# Liability for Environmental Damage within the Romanian Law

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**Abstract**: The institution of legal liability for environmental damage in Romanian law is increasingly more present due to the impact of environmental damage both nationally and globally. Industrial development, application of high technologies and irrational exploitation of resources have caused environmental damage often difficult to quantify. In Romanian law environmental liability is based in Government Emergency Ordinance no. 195/2005 on environmental protection and in Government Emergency Ordinance no. 68/2007 which transposed Directive 2004/35/EC and Directive 2008/99/CE transposed in Romanian Law by Law no. 101/2001. Legal liability for environmental damage takes the form of civil liability, contravention liability and criminal liability.

**Keywords:** environmental damage; civil liability; contravention liability; criminal liability; Directive 2004/35/EC; Directive 2008/99/CE

## 1. General Aspects Regarding Legal Liability with in the Environmental Right

The institution of legal liability generally refers to a complex of rights and associated obligations that appear as a consequence of doing some wrong, and that represent the context within which state's coercion can be applied (Gheorghe, 2000, p. 65) as it is to be found in various juridical fields, legal liability concretizes depending on the deeds that make it possible, their juridical status, the sanctions and the objectives followed by the legislator.

Juridical liability differs according to the degree of the concrete social danger of the deed, the latter being considered, according to this criterion, crime or contravention, having as a result two possible forms of legal liability: contravention liability or criminal liability. In the case when the deed does not match either of these two categories, but yet has produced a real prejudice, it will be compensated by civil liability.

The approach of the institution of legal liability for the wrongs done by the environmental factors was reservedly made both as an ideology and in juridical

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practice, this also because of the fact that there is not an institutions responsible for the environment within the environmental right, an institution that could have as its main scope the prevention and compensation of the prejudices caused to the environment. Within the environmental right the juridical norms have to contribute to the to the realization of some concrete objective that consists in preventing pollution of any kind, in maintaining and making life conditions on the Earth better.

Regarding the measures (including the juridical norms) that aim at the protection of nature, special attention has to be given to the preventive element and to that of environmental reconstruction, because the environment, most of the times, if being destroyed, cannot be brought back to its normal state.

In various occasions, giving sanctions (even hard ones) is not enough in order to prevent the deterioration of the environmental factors. Therefore, the environmental law should establish a series of serious conditions that should be considered when any activity that presents risk factors to the environment is developed. We firstly refer to the procedure of authorizing the economic and social activities that impact the environment and to the liability regarding the impact study. Also, we have in mind other economic and fiscal key factors for environmental protection, such as: the politics of the prices that favors environmental preservation, the subventions, the tax returns, the extra pay for pollution etc.

It is specific to the environment law the fact that within this field juridical liability enters the discussion in the situation when a certain prejudice was caused by the deterioration of the environmental factors, as well as in the situation when, even if the environment was not polluted, yet illegal deeds that interfere with the norms of environmental law, and such deeds can create the favorable conditions for pollution (Lupan, 2009, p. 357).

In this way, juridical liability will be double: I will belong to the one who pollutes the environment, guilty of the deterioration of the environmental factors, as well as to the public official or to any other physical or juridical person who, although does not contribute to environmental pollution, breaks the environmental law by the deeds that he/she does.

In this way, we may say that in environmental right the concept of juridical liability has a broader and richer meaning. Juridical liability on the matter regards not only the punishing of those that prove guilty for the pollution of the environmental factors or of those who, even if do not deteriorate the environment by their deeds, still break the environmental law, but also the taking and respecting of persons or state organs, the public or private institutions of all the measures that contribute to ensure the optimal conditions for the development of all the economic and social activities, in such a way that the risk of pollution should be minimized.

Taking all these characteristics of juridical liability, provisioned by the Romanian legislation on the matter for environmental deterioration, into consideration the fact

that the environmental right is different from the civil or criminal law as a common right, for instance, can be easily noticed. Such differences, as well as the existence of certain deficiencies, offer jurisprudence the occasion to interpret in new ways in order to ensure the efficiency of the legislative action.

In this way, by the present study we intend to identify the particularities of the juridical liability in environmental law against its classical interpretation.

## 2. Civil Liability for Environment Damage

Civil criminal liability for the prejudices caused by the environmental factors could be brought into discussion by introducing the civil law means, as it follows: the institution of the civil criminal liability and the application of the principles of good neighborhood in case of pollution. The general juridical context for the protection of the subjective environmental rights also by means of civil right is generated by constitutional provisions.

This general context in principle is complemented by the new provisions in the field of the environment and the mending of the damage brought to it. In this way, the legislation of the European Union and the international conventions on the matter make an appeal to the institution based on the ideas of risk and guarantee, and regarding the granting of the effective reclaim of the damage, the system of making new insurance covers and compensations for the victims that were prejudiced as a consequence of certain environmental accidents caused by men's activities.

Along the same line of thought, the polluter pays principle has to be taken into consideration as a fundamental principle of right that should be provisioned by laws meant to ensure its application in a compulsory and unconditional way. Also, each individual has a subjective right to environment (Gilles, 1977, p. 261) whose keeping can be realized only by the efficient protection of all the environmental factors. Any violation of this right, having an absolute and intangible character, gives the owners the right to start the legal actions against any public authority or the polluter itself, depending on the situation, so that the damage brought to the environment should be mended, and as a result the damage brought to their person. Also, regarding the protection of the environment, anyone being a victim of some environmental prejudice is being given the right to start legal actions against non-governmental organizations, as well (Marinescu, 2010, p. 624).

Finally, we consider that the norms of the civil right will be applied on the matter of liability for environmental damage by adjusting them to the characteristics of the juridical relations of environmental right. There are no special provisions in the field of the liability for prejudices caused to the environment. Therefore, in order to establish the liability in the situation when environmental damage is produced an appeal to the institution of the civil criminal liability is made which is provisioned

by the Romanian civil law in article 1349 and the following ones. These texts of law provision, along with the liability for one's own and direct deed, the liability for somebody else's indirect deed, in such a way civil criminal liability going beyond the limits of one's own deed.

Out of the forms of the criminal liability for somebody else's deed, we consider that they can be applied in the field of the environmental right: the liability for prejudices caused by things (art. 1376 of The New Civil Law), the liability of the (art. 1373 of The New Civil Law), the liability for the ruin of the edifice (art. 1378 of The New Civil Law), and the liability for the prejudice caused by animals (art. 1375 of The New Civil Law).

Specifically for the environmental right, environmental damage can be caused as a result of committing illegal deeds that brings along a subjective liability based on guilt, but also as a result of committing, developing legal, allowed deeds, this generating an objective liability based on the idea if risk (Marinescu, 2010).

We notice in practice that subjective liability for environmental damage is pretty rarely applied. The victim of such a prejudice should prove that by committing an illegal deed was caused a prejudice and that there is a causal relationship between the deed and the prejudice, and that the author of the illegal deed is guilty. The prejudiced because of pollution, for instance, would be in a very difficult situation having the duty to prove the guilt of the author and who the author is, and the difficulty is also increased by the fact that there is a diversity of pollutants that disperse in different ways and cause multiple pollution.

In the old law, along with proving the guilt of the one brought to the front, the prejudices also had to prove that he/she also fulfilled one's obligations regarding the safety of the goods that he lost in such a way, and by the amendment and abrogation of Law no. 103/1996, this provision was excluded, and in this way an additional condition eliminated as it had to be proved in order to drag along the civil criminal liability.

Therefore, nowadays, the tendency to institute the objective civil liability, based on the idea of risk manifests itself within the internal right. This imposes itself by taking into account the specific that the environmental damage represent: the need to urgently mend the damage, the weight (sometimes the impossibility) to repair the prejudice in kind, difficulties in establishing the quantum of the damage, the causing of chain effects for a long time etc.

Also, civil liability for risk and implicitly the institution and perfecting of an adequate insurances system will determine the stimulation of the diligent and prudent attitude towards the environment by rationally using all the environmental factors (Duțu & Duțu, 2014, p. 134).

The particularities of civil liability for the ecological risk also show by a series of advantages, in this way ensuring a more efficient protection for the environmental factors. In this way, the hypotheses for which liability is not in question, as the victim always receives compensation are excluded. Also, among the situations of forgetting liability only *force majeur* remains, and neither I can have an absolute character.

The environmental risk also presents a series of characteristics. In this way, pollution, no matter its way of manifestation, is a permanent danger and it can be very serious as the fact that its negative effects manifest themselves slowly for a long period of time, sometimes affecting irreversibly the human balance. When these negative effects of pollution cannot be controlled and mended at the right time, sometimes getting out of control, the consequences are catastrophic.

Starting from this desideratum, meaning the character of intensified safety, the system of civil liability for risk was also adopted by the Romanian legislator by GEO no. 195/2005 regarding the environment protection. This legislative act provisions (in art. 95, line 1) the form of objective liability (independent of fault) for ecological damage, and in the situation when the prejudice was caused by multiple authors their plural liability is established. This ensures the application of the polluter pays principle and follows the possibility to repair the prejudice by ensuring an increased protection for the victims of the ecological damage.

Some special provision exists in the situation of the civil liability for the nuclear damage. Civil liability on the matter is brought under the juridical regime by the Convention of Geneva regarding civil liability for the nuclear damage in 1963 to which Romania adhered by Law no. 106 of 1992 whose provisions will be corroborated with the directives of law no. 111/1996 regarding the development of the nuclear activities safely.

The provisions of these normative acts instituted as series of principles that act in the field of civil liability for nuclear damage, such as: objective and exclusive liability, guiding liability towards the exploiter, the obligation to offer financial guarantees, the obligation for insurance and so on.

The gravity of the possible nuclear damage and the difficulty of evaluating and repairing such damage imposed the institution of certain severe norms of security in the nuclear industry and, at the same time, a leveling of the special system of civil liability at the international level within this field.

Also as a particularity, we mention that in the nuclear field only nuclear cataclysms are considered to be causes that request for no liability, as they have an exceptional character – the armed conflict, hostilities, the civil war or insurrection.

As for the ***evaluation of ecological damage***, there are a series of difficulties determined by the impossibility to know all the elements and conditions that led to their producing and also by the fact that numerous natural elements of the

environment that were damages, destroyed, may times irreversibly, have an immense value.

Presently, we cannot speak of a highly efficient method to evaluate the environmental damage. Anyway, for a most correct and complex evaluation it is recommended that the state should take part in the negotiations for the evaluation of the ecological damage through its organs – the polluter, the victims, the representatives of the organs with duties in the field of the environment protection, the environmental nongovernmental organizations etc.

In order to establish the proportion of the environmental damage more methods were configured (Marinescu, 2010, p. 624). First, they noticed that only a category of environmental damage can be relatively easily evaluated from the financial perspective, namely those caused by the integrity of the persons, the goods, or the commercial activities.

In some of the cases, the damage of the goods outside the civil network has to be considered. For instance, the damage caused to the sea environment should be considered losses for the activities of fishing or for tourism. The most advantages are linked to the fixed evaluation of the damage, a method that presupposes establishing certain reckoners in the case of natural goods or species damage.

As for the ***mending of the ecological damage***, the difficulties appear when the damage cannot be mended as such, and therefore they appeal to mending it by some compensation of any sort, for instance paying a sum of money that should help to the ecological reconstruction of the damaged environment) or the mending is unpredictable, or there are issues when trying to determine who is responsible or when identifying the victim.

So that the ecological damage should be mended there are two possibilities: the social reimbursing for the damage that allows automatic compensation for the victims or identifying the author in order to force him/her to offer some compensation by establishing some causal connection that often is hard to make, especially in the situation when there are multiple potential sources of the damage or when the damage is caused after a longer period of time.

There are also difficulties when trying to identify the victim, as it usually is obliged to act in the sense of mending the damage. By analyzing the legislation and jurisprudence of different countries we can come to the conclusion that those who invoke the violation of their physical integrity or of some patrimonial interest, those who are empowered to administer or protect different environmental elements, and the NGOs can be justified in protecting their interests on the (ecological) matter.

We can say that the right to compensation does not find its legal basis in the behavior of the author of the environmental damage, but in each person's right not to be deprived of the value of some good or of some favorable situation, or of the normality

of the environment that one lives in. Also, we appreciate that, along with the institution of some legal special and efficient condition regarding civil criminal liability in the field of the environmental right, a politics of the states is also necessary that should encourage the harmony between man and nature, and that should promote efforts to prevent and eliminate the damage caused to the environment.

## 3. Contravention Liability for Environmental Damage

Contravention liability is a form of administrative liability (the relation between the two being one as between the part and its whole), the contravention being "a type of manifestation of the administrative unlawfulness, its most serious form, and its legal regime generally being an administrative one" (Ţiclea, 2006, p. 20).

From the statistical point of view, contraventions on the matter are numerous (even more than crimes) and they take a huge variety of shapes. In the majority of the normative acts (either laws, decisions, ordinances, or emergency ordinances emitted by the Government, ministerial orders, decisions of the organs of the central or local public administration) we shall meet a provisions for crimes (where normativity can be reached, because crimes cannot be instituted otherwise but by means of the law), but especially of contraventions o the matter.

Although they may seem high in their absolute value, in fact, the limits for the fines established by the legislator are relatively small if we take into consideration that those who break the norms imposed can be sometimes multinational financially potent companies that can afford paying some sum of money that is often a symbolic one to them.

This fact makes the fine seem a relatively inefficient sanction that allow to some of the above mentioned to pay off-handedly, and acquiring in this way a true right to pollute. (Duţu, 1998, p. 200)

For this reason, more efficient ways to sanction these economical mastodons should be found, and they should involve clearer solutions by which the managers, the directors, or their representatives should be given sanctions to deprive them of their freedom (in this way changing the type of liability). Anyway, a new system of sanctions should be imposed by which fines proportional with the turnover of the economic agent should be given.

Another possibility would be to establish maximal limits for fines much bigger or even limitless or, as the final measure, the daily fine. As jurisprudence also demonstrates, punishing the legal persons is far more efficient by means of complementary sanctions (suspending the activity or shutting the unit down, obliging the unit to bring the environmental factors to the previous state when there was no pollution, forbidding the development of certain activities, publishing the

criminal conviction etc.) because, according to some statistics, the court showed a lot of mercy when putting certain punishments depriving one of one's freedom into practice for the representatives of the legal person came into question, even in the case when serious deeds are committed that resulted into major environment pollution.

## 4. Criminal Liability in Environment Right

Generally, criminal law defines itself by two categories of juridical relationships among the members of society and the state (Dobrinoiu & Brînză, 2003, p. 320): juridical relations of conformity (that presuppose lining up the behavior of the individuals to the demands imposed by the law as these appear in the majority of cases) and juridical relations of conflict.

The latter report represents criminal liability, a concept that nominates the criminal juridical relation of constraint that appears as a result of committing a crime. Generally, environmental crimes (so those crimes that violate the protection of environment) were defined (Lupan, 1996, p. 371) in the following way: "they are deeds by means of which the environment is polluted or actions/lack of action by which directly or indirectly the interests of qualitative or quantitative protection of the environment factors are violated".

Not all violation of the norms of environmental right engage criminal liability, but only those representing a high social danger and as such a serious threat to the most important interests of society on the matter. In order to be considered crimes, the polluting deeds have to be a particular social danger (higher than that of contraventions) and be committed in such circumstances that, according to criminal law, they could be considered crimes. (Lupan, 1996, p. 369) Criminal deeds should always be expressly considered by the environmental law.

In Romania, using criminal law for the protection of the environment is a pretty recent finding of the legislator that happens because of the spread of the phenomenon of crime. The issue is not necessarily the inexistence of the incriminating norms (the legal context exists, but under the pressure of the community right), and difficulties appear regarding the procedure of effectively applying these norms, also having in mind the huge difference between real criminality and that found and punished.

The belated imposing of the criminal liability as a means to efficiently protect the environment is caused by a series of historical considerations: traditionally, criminal right defends material values such as patrimony, life, physical integrity, the freedom of the person and less an ample and relatively inaccurate value such as the environment; historically speaking, the first incriminations regarded fighting against the consequences of the various environmental contaminations on public health and polluting drinkable waters. It is as much true as the fact that at least in the past

centuries polluting the environment did not represent an urgent matter because its damage were not as numerous and widely spread as they are today.

Although in the field of environmental protection liability should mainly be preventive and patrimonial (civil and contravention liability), the contribution of the means of criminal law should not be neglected, especially from the perspective of its adjustment to the needs of the new reality and the increased danger of destructive actions for the national and international ecological patrimony (Duţu, 2007, p. 548).

As for the legal context for the environment protection, criminal liability can appear in two cases:

- For committing deeds by which the natural or artificial (anthropic) environment is polluted;
- For committing certain deeds by which the imperative directives of the legislation of environmental protection are broken, although these actions or lack of actions do not directly cause the pollution of the environment.

The particularities of criminal liability in the field of the protection of environment is given, among other things, by a series of factors such as: the nature of the object protected by the law, the social and juridical relations regarding the health of the environment, the specific sanctions corresponding to the environment right that have to differ a little from the traditional ones etc. for instance, by introducing the criminal liability of the legal person an important step for Romanian legislation was taken, especially that the main polluters are legal persons.

Along with introducing criminal liability, a series of criminal sanctions that can be applied only to the legal person were also introduced: suspending the activity of the unit or even shutting it down, putting it under juridical surveillance, its exclusion from public markets, the interdiction to write cheques for a certain period of time, the interdiction to develop certain activities, making public or broadcasting conviction decisions taken in court.

The active subject of the juridical relation of criminal right can be either a physical person (Romanian or foreign citizens, stateless, persons with double citizenship, but also some legal persons. Into this juridical equation the state always enters by its empowered organs as it is entitled to the right to give the sanctions provisioned by the law.

The form of guilt by which crimes are committed in the ecological field can be premeditation (under its double aspect), but also guilt (in the second degree) or praeter intention (when the law expressly mentions it).

The tendency on the matter shows that many times criminals commit deed without premeditation (the cases when he/she who commits the crime acts with the mentally

configured purpose to victimize any environment factor, namely with premeditation are rare). Statistically, yet, most of the ecological crimes are committed out of guilt (in its both meanings), negligence and easiness being those to be frequently found in the subjective side of an environment crime. The practical ways to commit crimes are extremely numerous, the wideness of the field and of the social values protected by the legislator being given.

The mobile and the scope are also highly important components of the subjective side, their relevance being different from one case to another. In this way, an environment crime can become in certain cases (massive pollution of certain sources of drinkable waters, the destruction of certain species of animals or plants upon which the survival of some population depends) and a highly serious act of terrorism.

Unfortunately, this new type of ecological terrorism is highly more dangerous than the classical terrorism because of its ample effects, their duration in time, and the dynamic of the phenomenon in ascendance.

Out of all he provisions that impact the field (especially Emergency Ordinance no. 195/2005 regarding the protection of the environment) the doctrine (Romiţan, 2004) tried to systemize crimes, having as a result ten categories of crimes provisioned and punished by the actual legislation: crimes by which economic and social activities, having an impact on the environment, are perturbed; crimes regarding the procedure of authorization; crimes regarding the regime of substances and dangerous waste; crimes towards the regime of the chemical dung and pesticide; crimes towards the regime of the protection against the ion radiations and the security of the sources of radiations; crimes by which the protection of the natural resources and the conservation of biodiversity are violated; crimes regarding the protecting of the waters and aquatic ecosystems; crimes regarding the protection of the atmosphere; crimes regarding the regime of the protected areas and the monuments of nature; crimes regarding the protection of soil and subsoil; crimes regarding the breaking of the regime imposed to the terrestrial ecosystems (the woods); crimes for breaking the attribution, responsibilities, and obligations of the authorities for the protection of the environment, to physical or legal persons.

From the procedural perspective, noticing and following crimes in the regime of the environment protection are performed by default by the organs of surveillance according to the legal competence (article 99 of the basic law). Also, in the case when the commissary of the National Environmental Guard or of the Nuclear Activities Control discovers an environment crime has been committed, they are obliged to inform immediately the juridical assigned organs on the issues that occurred so that they may start the criminal following.

The existence of so many incriminations out of a multitude of normative acts (laws, emergency ordinances etc.) claim for their systematization, grouping, and classification not only at ideological level, but in a new environmental law that

resembles many other branches of right. The first step (creating a new category of crimes, namely crimes in the ecological field) was therefore taken.

The next stage has to regard the systematization of these crimes in an environmental law and, eventually, creating an environmental right, an independent branch of right, with its own institutions, principles, and subject of its own regulation.

In this way, we can approach the countries with a developed legislation in the field where there are no public prosecutors or courts specialized in environment crime.

By using the model of these countries with criminal legislation that can be applied in the environment right in Romania, as well, in time this subtype that in the present plays a secondary part in the environment protection; its norms adding to the civil or administrative provisions of the special regulations.

## Conclusions

Criminal liability in the field of the environment protection has to be regarded as a guarantee of some fundamental right to a protected environment of each individual. Yet, we have to notice the fact that, in accordance to this field, the prevention of causing environment damage and not the establishing of some liability for their compensation (because of the sometimes irreversible character of the ecological damage) is characteristic of this field.

The necessity to introduce a specific regime of juridical sanction in the environmental right is determined by concrete cause. The regulations on the matter are made of a whole of norms and procedures whose scope is to bring the environment protection under regulation. The failure to be in accordance with the actual norms and procedures can only lead to civil, administrative or criminal sanctions. Otherwise, juridical liability in the field of the environment adds to the actual regulations on the matter the obligation as potential polluter to pay for the mending of the damage (to a satisfying state) or the compensation of the damage caused to the environment.

True, there are multiple cases when mending the damage caused can no longer be accomplished. For instance, in the case of serious pollution that results into the complete disappearance of some bird species that used to live only in the area affected by pollution, the polluter cannot mend the damage caused to the environment, but he/she will have to put up with the juridical consequences of the crime that he/she committed. As we have already mentioned, we appreciate that the part legislation has to play regarding the protection of the environmental factors is firstly a preventive one. People, economic agents, governmental and non-governmental organisms have to adopt a certain behavior that might ensure and guarantee a healthy environment and avoid as much as possible the actions presenting the risk to pollute. As we know, it is much easier and less expensive to

prevent causing damage than mending it, not to mention that many times reducing the environmental factors to their initial state, to their normal parameters is impossible. Meanwhile, the environmental norms of right have to also have a mending character, also contain provisions that make the mending of the damage that are caused by polluting the environment and the people possible.

In this way, the diverse funds that are made in advance in order to ameliorate various environmental factors and, also, the diverse systems of insurance that work on the matter (for instance, the national fund for the environment, the fund for ameliorating the agricultural real estate, the fund for waters, the fund for the protection of chase, the special fund for the development of the energy system, the primes for forestation) are very useful and represent a guarantee for mending the damage caused to the environment. Also, naturally, the environmental law has to also have a sanctioning character by imposing, in our opinion, harder punishments than those provisioned in the present, especially in the case of deeds by which certain environment factors are severely, sometimes irreversibly, affected. Only by means of an efficient legislation that has an immediate and direct application in the sense of preventing and mending the damage caused to the environment, but especially with the help of all the actors involved in the protection and preservation of the environment factors (from the state by means of its institutions to each common citizen), we can say that also in Romania terms such as the environment protection, ecological balance, and reduced pollution will become realities, not only needs contained by the juridical norms of inefficient liability.

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