AN ATYPICAL FORM OF CIVIL LIABILITY – THE LIABILITY FOR THE ENVIRONMENTAL DAMAGE

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Abstract

The problem of environmental pollution is one of the most serious of today's society, with the consequence of deteriorating man's living conditions and the development of the future civilization.

Environmental law appears as a mixed right, being at the limit of public law with private law, and thus the right of civil liability can be considered as a means of enforcing environmental regulations , with the same title as administrative law.

Thus, civil liability does not make distress between damage (damage) and as such extends to the ecological field, the two cohabiting, based on interfering principles: the precautionary principle, the polluter pays principle and the principle of prevention.

Art. 44 para. Article 7 of the Constitution refers to the protection of the environment in the scope of the right to property: "The right to property oblige to observe the tasks related to the protection of the environment and to ensure good neighbourliness, as well as the observance of the other tasks which, according to law or custom, belong to the owner".

As regards the responsible person / person who may request the prevention or repair of environmental damage, it is necessary to consider, first of all, the general provision of art. 94 par. 1 lit. i from GEO no. 195/2005, which establishes the "polluter pays" principle. Also, Art. 1 of GEO no. 68/2007, which is a special law, states that environmental liability is based on the "polluter pays" principle, both for the purpose of preventing and repairing environmental damage.

Keywords: *the protection, envirommental pollution, special law, the precautionary, the consequence.*

1. Introductory notion

The The Romanian Constitution, adopted in 1991, included several tangential provisions regarding environmental law, establishing the state's obligation to "restore and protect the environment" and the obligation to protect the environment related to the right to property[1].

On the occasion of the revision of the Constitution[2], the fundamental right of man to a healthy environment[3] has been established, consecrating the legal framework for the exercise of this right, correlated with the obligation of natural and legal persons to protect and improve the environment[4]. We agree with the view that[5], in the content of human right to a healthy environment, its right to correct information on the possibility of ecological damage, an uncertain possibility, but which may cause possible dangers, must also be included.

We emphasize that other countries have been and are concerned about the protection of the environment, enshrining principles in fundamental laws[6].

By GEO no. 195/2006 on environmental protection[7] and by GEO no. 68/2007 on environmental liability with regard to the prevention and remedying of environmental damage[8], the legislator has established

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[1] Lacrima Rodica Boilă, *Răspunderea civilă delictuală obiectivă,* ediția a 2-a, Ed. C.H. Beck, București, 2014, p. 503.

[2] Law on the Revision of the Romanian Constitution of 18 September 2003 (Official Monitor No. 669 of September 22, 2003)

[3] Art. 35 of Romanian Constitution.

[4] Ion Dogaru, Pompiliu Drăghici, *Drept civil. Teoria generală a obligațiilor în reglementarea Noului Cod civil,* Edition 2, CH Beck, București, 2014, p. 480.

[5] Lacrima Rodica Boilă, *op. cit*., p. 504.

[6] Article 66 of the Constitution of Portugal establishes rules to ensure effective protection of the environment and quality of life by establishing the right of everyone to a healthy and balanced human life environment, correlated with the appropriate duty to defend it; The Framework Law of 8 July 1986 in Italy sets out the rules on environmental damage and provides in Art. 18-1, obligation to repair, provided it is prescribed by law as an offense. In Switzerland, the Nature Protection Act of 1.07.1996, obliges the perpetrator of an unlawful cause of damage in natural areas and protected biotopes to pay the cost of repairing it; The Indonesian law of March 11, 1982, on environmental management, establishes in art. 20, liability of the environmental polluter; The Spanish Constitution of 1978, in art. 45, enshrines the general principle according to which every person has the right to enjoy a healthy environment in order to develop his/her personality and the obligation to preserve it.

[7] O.M. no. 1196 of 30 December 2005, subsequently amended and supplemented by several normative acts, the last amendment being brought by Law no. 226/2013 (O.M. No. 438 of July 18, 2013).

[8] O.M. no. 446 of 29 June 2017 being amended and completed by GEO no. 15/2009 (Ordinance of the President of the Republic of Moldova No. 149 of 10 March 2009), GEO no. 64/2011 (Official Monitor, No. 461 of June 30, 2011); Law no. 249/2013 (O.M. No. 456 of 24 July 2013); Law no. 187/2012 (Official Monitor, No. 757 of November 12, 2012).

the legal framework regarding environmental protection in Romania.

2. Civil Liability in Environmental Law

Therefore, Tort law civil liability, according to some authors, must be considered in terms of its foundation, as follows: liability based on fault, liability of the commissioners for the deed of their offenders, faultless liability for the deed of work and special objective liability which includes the legal regime established by the Protection Law environmental liability, liability for nuclear damage, objective liability of the aircraft operator, liability for damage to persons and goods not on board during take-off, flight or landing[9].

In this area, liability can be subjective, based on the proven fault of the person who committed the act of damage or objective, for the deed of work, under the conditions established by the Civil Code or under the special provisions regarding the regime of this liability.[10]

As far as we are concerned, we consider that civil liability for environmental damage is determined by the existence/non-existence of fault[11], namely:

- subjective liability, based on fault;
- objective liability, which may be governed by the Civil Code or special laws[12].

Government Emergency Ordinance no. 195/2005 regulates the protection of the environment in our country. As a result of the efforts to take into account the Acquis Communautaire in the field, in art. 95 of GEO no. 195/2005 provides:

1. Liability for environmental damage shall be objective, independent of fault; in the case of the plurality of authors, the liability is jointly and severally.
2. Exceptionally, liability may be subjective for damage caused to protected species and natural habitats, according to specific regulations.
3. Prevention and repair of environmental damage shall be carried out in accordance with the procedures of this Governmental Emergency Ordinance and the specific regulations.

As stated in the doctrine, GEO no. 195/2005 established a regime of liability for environmental damage, close to the one established in Community law[13].

With the accession to the European Union in 2007, it was necessary to transpose the Council Directive and the European Parliament no. 2004/35/EC of 21 April 2004 on environmental liability, with particular reference to the prevention and remedying of environmental damage[14].

Thus, Romania transposed the Directive through GEO no. 68/2007, with the same title[15].

Taking into account the GEO no. 195/2005 and GEO no. 68/2007, in order to highlight the particularities of civil liability for environmental damage, it is imperative to analyse the notions of injury (which we have developed in the previous report) or the environmental damage, the responsible person and the persons who can demand the repair of the environmental damage, preventive and reparatory measures or actions, as well as the powers of the public authorities, the basis of liability and the legal nature of such liability[16].

Therefore, both categories of damage, pure environmental damage and ricochet damage are and must be repaired. As such, the repair of pure[17] ecological damage takes place according to provisions no. 95 of GEO no. 195/2005 and the special provisions of GEO no. 68/2007. On the contrary, reparation of damages caused by ricochet, caused to natural persons and private legal entities as a consequence of the damage to the environment, will be done under the conditions and according to the rules of the common law (Article 3 paragraph 4 of GEO 69/2007).

The State's obligation to guarantee the right to compensation for the damage suffered is regulated in Art. 5 let. E, from Law 256/2006, and the basis of liability for environmental damage is enshrined in art. 95 of Law 256/2006. [18]

Therefore, the objective basis of liability is the risk of dangerous activities for the environment or for people's lives, from which we conclude that the liability of the polluter will be committed only if there

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[9] Lacrima Rodica Boilă, *op. cit.*, p. 518.

[10] M.E. Pătrăuș, *Răspunderea civilă pentru dauna ecologică, Teză de doctorat,* coordinator L. Pop, Facultatea de Drept Cluj-Napoca, 2004, pp. 113.

[11] M. Uliescu, *Dreptul mediuluiinconjurator,* Fundatia „Romania de Maine", Bucuresti, 1998, p.44.

[12] For example, the liability determined by the neighbourhood relations.

[13] Mircea Duțu, „Prevenirea și repararea pagubelor de mediu potrivit Ordonanței de urgență a Guvernului nr. 68/2007", in *Dreptul* no. 11/2007, p. 11.

[14] Published in *Journal Officiel des Communautés Européennes,* no. L 143 of 30 April, 2004.

[15] Published in O.M. no. 446 of 29 June 2007, modified and amended by GEO no. 15/2009, published in O.M. no. 149 of 10 March 2009 and by GEO no. 64/2011.

[16] Liviu Pop, Ionuț-Florin Popa, Stelian Ioan Vidu, *Tratat elementar de drept civil. Obligațiile conform noului Cod civil,* Universul Juridic, București, 2012, p. 540.

[17] Damage that causes the natural environment.

[18] 1. Liability for damage shall be objective, independent of fault. In the case of plurality of authors, the liability is jointly and severally.

2. Exceptionally, liability may also be subjective for damage caused to protected species and natural habitats, in accordance with specific regulations.

3. Prevention and repair of environmental damage shall be carried out in accordance with the provisions of this Emergency Ordinance and the specific regulations.

is evidence of a causal link between his activity and the environmental damage that has occurred.[19]

Objective liability is based on the idea of the risk of activity for environmental damage[20], aiming to ensure greater protection of victims of environmental damage.

Objective responsibility is based on the idea of the activity risk for environmental damage, aiming to ensure greater protection of victims of environmental damage in the future.[21]

Civil liability concerns the culpability of the responsible person who is assessed in terms of the normality of his preventative conduct, the sanction intervening for lack of precaution.[22]

As regards the responsible person, the person who may request the prevention or repair of environmental damage, it is necessary to consider, first of all, the general provision of art. 94 par. 1 let. I, and from GEO no. 195/2005, which establishes the "polluter pays" principle. Also, Art. 1 of GEO no. 68/2007, which is a special law, states that environmental liability is based on the "polluter pays" principle, both for the purpose of preventing and repairing environmental damage.

Under these circumstances, liability is both reparatory and preventive.[23]

Any natural or legal person may have the status of polluter, however, according to art. 2, art. 10-15 and art. 26 and following of GEO no. 68/2007, the polluter is designated the operator of professional activities. Thus, according to art. 2 point 10 of GEO no. 68/2007, an operator means any natural or legal person governed by public or private law who carries out or controls a professional activity or who has been entrusted with decisive economic power over the technical functioning of such an activity, including the holder of a regulatory act for such an activity or the person who registers or notifies such an activity[24].

Professional activity[25] is any activity carried out in a business or enterprise, irrespective of its private or public character, profit or non-profit.

As regards the sphere of persons entitled to demand the prevention or repair of environmental damage, it is necessary to consider the provisions of Art. 5 letter d) of GEO no. 195/2005, which is in conformity with Community rules and provides that the State recognizes, by virtue of the right to a healthy environment, the right to address, directly or indirectly (through environmental organizations), to the competent authorities in environmental matters, irrespective of whether or not an injury has occurred.

Article 20 para. 6 of GEO no. 195/2005 provides that non-governmental organizations have the right to legal action in environmental matters, having an active procedural capacity in such litigation.[26]

In art. 20-25 of GEO no. 68/2007 regulates the right of any natural or legal person to address to the competent public authorities, in the case of environmental damage, which has affected this person, solving the complaint/request following the steps of the established administrative procedure[27].

Against the decisions taken by these authorities, dissatisfied persons can act in administrative litigation. We emphasize that this right also belongs to non-governmental organizations that have the mission of protecting the environment.

Concerning preventive and reparatory measures, GEO no. 68/2007 clearly establishes that polluters are required to take all measures to prevent and repair damage to the environment[28], while setting out how to bear the costs of these actions.

As such, any operator is obliged to prevent imminent damage and to inform the competent authorities (the county environmental protection agency and the County Environmental Guard)[29] within the time limit set by law.

Also, the necessary preventive measures must be proportionate to the imminent threat and lead to the avoidance of injury, taking into account the precautionary principle in making decisions[30]. All these activities are an expression of preventive liability for such damages.

According to the law, the county environmental protection agency may at any time request the operator to take the necessary preventive measures, as well as the possibility to take and carry out the necessary preventive measures itself. [31]

According to art. 2 point 10 of GEO no. 68/2007, reparation measures are any action including injury mitigation or interim measures aimed at restoring, rehabilitating, replacing damaged natural resources or providing an equivalent alternative to those resources or services.

According to art. 14 par. 1 lit. a of GEO no. 68/2007, polluters have the obligation to act immediately to control, isolate, eliminate the negative

[19] Lacrima Rodica Boilă, *op. cit.*, p. 506.
[20] Major risk generating activities are those in the field of nuclear energy, explosive materials and materials, hazardous toxic waste, radioactive emissions, etc.
[21] *Ibidem*, p. 144.
[22] *Ibidem*.
[23] According to art. 2 para. 1 pt. 2 of GEO no. 68/2007.
[24] Liviu Pop a.o., *op. cit.*, p. 542.
[25] According to art. 2 pt 1 of GEO no. 68/2007.
[26] L. Pop and others, *op. cit.*, p. 542.
[27] The administrative procedure and the competent bodies in the matter are stipulated in art. 20-25 of GEO no. 68/2007.
[28] L. Pop and others, *op. cit.*, p. 543.
[29] Art. 2 pt. 9 of GEO no. 68/2007.
[30] Art. 10 para. 3 of GEO no. 68/2007.
[31] Concerning the competences of public authorities in the matter, see Art. 10-12 of GEO no. 68/2007.

effects on human health or worsening the deterioration of services.

Also, the operator is obliged to take the necessary reparation measures established according to the law by the county environmental protection agency under the conditions and according to the procedures.[32]

We emphasize that remedies must be proportionate to the damage caused, also taking into account the precautionary principle in making decisions.[33]

Repair of damage according to Annex 2 to GEO no. 68/2007 may be of three kinds:

a) Primary repair (reduction of natural resources and services affected at the initial[34] state or close to it); b) complementary repair (the remedial action to be taken in relation to natural resources to compensate for the fact that the primary repair did not lead to full recovery); c) compensatory reparation (compensation for the loss of natural resources that took place between the date of the damage and the moment when the primary repair takes its full effect).

The costs of preventive and reparatory actions are borne by the operator who caused the damage.[35]

If these costs were borne by the county environmental protection agency, they will be recovered, except in the cases provided by the law, from the polluter operator[36].

In order to guarantee the recovery of these costs, a legal mortgage of the agency is set up on the operator's real estate and an insurance indemnity, according to the law. The registration of the mortgage in the land register and the establishment of the seizure shall be made on the basis of the order of the head of the county environmental protection agency which has established the preventive and reparatory measures that it has carried out.[37]

Operators' liability is jointly owned if two or more operators are concerned.[38]

There are also exceptional situations when the operator is not obliged to bear the costs of the preventive and repairs measures that have been taken.[39]

To attract objective liability, hazardous activities must be found in Annex 3 of GEO no. 68/2007.

From the provisions of art. 95 para. 2 of GEO no. 195/2005 that the legislature did not completely distance itself from subjective liability based on fault, since it held that "*exceptionally, liability may also be subjective for damage caused to protected species and natural habitats, in accordance with specific regulations*".

As it follows from the above, for the liability of an operator, the following conditions[40] are necessary: the existence of the damage[41], the unlawful act and the causal relationship between the damage and the unlawful deed.

3. Conclusions

Thus,

Finally, we consider that the right to compensation is based on the legal basis not on the behaviour of the author of environmental damage, but on the right of everyone not to be deprived of the value of a good or an advantageous situation in the normal state of the environment in which he lives.

The burden of proof, relating to the existence of elements of tort or delict, lies with the person who is acting in court, usually the victim of environmental damage.

As regards proof of legal action (stricto senso), any evidence is admissible, including witness evidence.

Difficulties are seen in proving guilt because it is a psychic, internal element. Because of the subjective nature of this element, its direct proof is virtually impossible. What can be proved are only the external elements of behaviour, the author's deed and the illicit character of the deed, the eventual circumstances of place and time, the personal ones of the author. At the same time, the injured party has the right to do the opposite, on the facts and circumstances that may remove his guilt.

Expertise may also be available to determine the environmental damage and the causality ratio between the deed and the damage and to determine the amount of damages.[42]

Civil liability lies in environmental law as a last resort, with techniques and tools, especially those of an economic and fiscal nature being given priority.

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[32] Conform. art. 15-19 din OUG nr. 68/2007.

[33] Conform art. 14 alin. 2 din OUG nr. 68/2007.

[34] Art. 2 pct. 22 din OUG nr. 68/2007 definește starea inițială ca fiind starea resurselor naturale și serviciilor la momentul producerii prejudiciului, care ar fi existat dacă prejudiciul asupra mediului nu s-ar fi produs, estimată pe baza celor mai bune informații disponibile. Article 2 point 22 of GEO no. 68/2007 defines the initial state as the state of natural resources and services at the time of the damage that would have existed if environmental damage had not occurred, estimated on the basis of the best available information.

[35] Conform art. 26 din OUG nr. 68/2007.

[36] Conform art. 29 alin. 1 din OUG nr. 68/2007.

[37] Art. 29 din OUG nr. 68/2007.

[38] Art. 31 din OUG nr. 68/2007.

[39] Art. 27-28 of GEO no. 68/2007; M. Duțu, op. cit., pp. 15-17 (force majeure, the state of necessity, valid consent given by the victim, the serious fault of the victim who acted wrongly or failed to act).

[40] Art. 2 pt. 11 din OUG no. 68/2007.

[41] According to art. 2 pt. 12 and 13^2 and art. 3 of GEO no. 68/2007.

[42] Gh. Ducan, *Drept civil. Teoria generală a obligațiilor.* Dimitrie Cantemir, Târgu-Mureș, 2000, pp. 65-66.

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