IS THE ROMANIAN CIVIL CODE TENDING TOWARDS GREENING? (Part I)

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ABSTRACT: *The greening of legislation is a dynamic and evolving process, driven by the obvious realities of the state of the environment and its ecosystems, their role and value. The good integration of environmental concerns into the legal system, the coherent approach to environmental issues and the interactions between regulations have contributed to the evolution of the greening of legislation.*
Not only the imposition of ecology as a constitutional value but also the greening of civil law has succeeded in reordering and transforming the landscape for the branch of environmental law, which also has a solid basis in ecological research and the construction of ecological civilization.
In this paper we will analyze the tendency of greening of the current Romanian Civil Code, by inserting in its text provisions on the protection of subjective rights, the conservation of environmental resources, the establishment of liabilities related to the reparation of environmental damages and others. In order to capture the ecological orientation of this legislation, we have tried to analyze the extent to which traditional civil notions and concepts, principles and systems are compatible with the current requirements of ecological interests. One obvious fact we reveal is that its rules fail to fit in with the dynamism of the extremely important field of the environment with all its problems and that they do not adequately adapt to the requirements of environmental interests.

KEYWORDS: *environmental rules, ecological requirements, greening, civil Code*
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1. SOME INTRODUCTORY APPRECIATIONS

Certainly, there is no nation that does not face environmental challenges, which requires a response primarily through a legal regime that ensures the protection of the environment and nature overall. At the same time, environmental regulation schemes take different forms, as there are highly concerned nations that place environmental protection at the highest level and ensure it through national constitutions, just as there are nations that reveal it only at a statutory level. Similarly, there are nations that establish a series of positive rights, assigning their government obligations to protect the environment and its

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ecosystems, to restore affected ecological balances, while others create negative rights, trying to prevent pollution of environmental factors.

From the analysis of the different regimes of environmental regulation, neither the source of law (constitutional or statutory) nor the form of legal regulation (positive or negative) is the dispositive factor capable of determining the protective level of a nation's environmental law regime. As far as we are concerned, we believe that it is not the level of regulation of these environmental provisions, not their legal force, but the way in which they are applied that controls and dictates the outcome. Not a few times it has been found that the highest promise of the state and quality of the environment may remain unfulfilled due to the lack of proper enforcement of environmental legal provisions or, on the contrary, total unjustifiability, while some restrictions stipulated only at the statutory level, apparently less important on environmental degradation, may result in greater benefits.

In this context, we recall a point made by the UN's first Global Report Environmental Rule of Law Nairobi 2019, which shows that laws to protect nature and its ecosystems have increased dramatically (almost 40-fold since 1972) as nations have come to understand the vital connections between the environment, economic growth, public health, social cohesion, and security. The serious problem is that environmental laws, although numerous, are widely failing to be fully implemented and enforced, a global trend that is exacerbating environmental threats and diminishing public health, economic and social benefits.

As far as the process of greening legislation is concerned, it has followed an evolutionary path, starting almost five decades ago, a path supported by international environmental documents, doctrine and especially case law, which have reacted and contributed to a large extent to the regulation of environmental issues not only at the legislative but also at the constitutional level, eventually imposing ecology as a constitutional value. Romania's Constitution, before 1990, was pre-ecological, in the sense that there was no mention, implicit or explicit, of environmental issues.

There is no doubt that the protection of nature and its ecosystems in the laws and constitutions of the states has gained great dynamics because of the recognition of their role and value, the enshrinement of environmental protection principles and duties towards the environment, and not least through the establishment of the right to a healthy environment, which has developed spectacularly. The dynamics of this process have been categorically influenced by the dangers of pollution, waste of natural resources, the increasing negative consequences of climate change and the complexity of globalization (Dogaru, Environmental change and its effects, 2017) (Dogaru & Kajcsa, 2021) (Dogaru & Kajcsa, Interrelationship between Globalization and Environmental Protection, 2011).

And what has become apparent is that with the extraordinary growth of technology, mankind has built a parallel, artificial world, using nature and the entire natural system as a freely available toolkit, without concern about the protection and reproduction of its capacity (Perthuis & Jouvet, 2015) (Dogaru, About Sustainability between Responsible Production and Consumption, 2021). And lately, a virtual world has been superimposed on this artificial world, whose power over human behavior and representations is constantly increasing. In this way, there are two artificial constructions that cloud people's relationship with the natural world and even manage to give them illusions of power that are deviant and dangerous.

These are good enough reasons to constantly build necessary and resilient relationships with nature, including through legal instruments. Whereas the appearance of numerous environmental regulations has succeeded in reordering and transforming the landscape for the branch of environmental law and indicate the concerns of civil and criminal law in this regard (Duşcă, 2021).

Ensuring effective legal protection of the environment and its ecosystems necessarily involves interactions within the legal system as a set of elements, at national, regional, and international regulatory levels, and between branches of law. Only a good integration of environmental concerns into the legal system, the elimination not only of contradictions but also of parallels between competing legal rules, a coherent approach to environmental problems, interactions, and mutual influences of regulations, can ensure the process of evolution that the greening of legislation needs.

The trend towards the greening of civil codes is increasingly analyzed at the doctrinal level, by inserting in their contents rules on the protection of subjective human rights, the development of the rights of nature (Dogaru & Dogaru, The Rights of Nature. A new paradigm (I), 2022) (Duşcă, Natura ca subiect de drept, 2020) and ecosystems, the conservation of resources, the establishment of liabilities related to the reparation of ecological damage, etc. (Lanni, 2023) (Dogaru, The relationship between environmental protection and economic growth from the perspective of sustainable development, 2018). All this is happening in a context where a number of supranational rules favor measures and strategies to reduce the effects of climate change and global warming and discuss the need to expand distributive justice and the use of private law instruments to defend nature and the earth's ecosystems as part of life.

The first step of the civil codes of the Member States of the European Union in this direction was to make use of the provisions of European environmental law instruments (Duşcă, Dreptul mediului, Caiet de seminar, 2019) (Dogaru, The importance of Environmental Protection and Sustainable Development, 2013), through the implementation of legal norms relating to people's obligations in the use of the earth's resources, in the protection of the environment, in the repair of damages caused and the ecological restoration, their right to a healthy environment (Boyle, 2017).

It is quite true that environmental research, together with the construction of ecological civilization, constitutes a solid basis for environmental law in general (Dogaru, Dreptul mediului, 2nd Edition, 2020), and civil law in particular, thus creating a dual regulation which, in view of improving the state of the environment and compensating for the damage done to it by pollution or other human actions, or affecting private interests, is often combined and complemented.

2. GREENING ASPECTS OF ROMANIAN CIVIL CODE

Analyzing how the current Romanian Civil Code is incident to the social relations that take place in relation to the environment and its components, we will try to understand the intention that this legislation expresses[1], namely, that of responding to the imperatives of

[1] From the explanatory memorandum accompanying the new Civil Code, which became a legislative reality following its adoption by Law No 287/2009, published in the M. Of. No 511 of 24 July 2009, which entered into force on 15 July 2011.

today's dynamic world by means of new solutions, by revising classic civil law institutions, and even by highlighting internationally recognized principles that are not implemented in Romania.

In order to capture the ecological orientation of the new Civil Code, we have tried to analyze the extent to which traditional civil notions or concepts, principles and systems are compatible with the current requirements of ecological interests. What is obvious is that the rules of this legislation fail to keep up with the dynamism of the extremely important field of the environment with all its problems, and do not adequately adapt to the requirements of ecological interests.

But as we are constantly witnessing partial revisions of civil law values, we are convinced that ecological interests will be fully enshrined as non-utilitarian interests in contrast to utilitarian interests belonging to individuals, with a view to reconciling individuals, society and nature as their living environment.

This appears difficult for several reasons. On the one hand, the civil interests promoted by the legislator today are individual private interests of subjects, and not public interests such as those related to the protection and conservation of nature and the environment. In addition, from the perspective of environmental protection, we believe that some necessary restrictions should also be imposed on the exercise of civil rights in order to balance the relationship between individual freedom and the protection of the environment and its ecosystems. Because it is precisely this balancing which can only be done by inserting restrictions on civil rights, which, as I have shown above, constitutes an extremely important guideline for the greening of civil law. Also, the basic rule or principle in matters of civil tort or contract liability is that of effective compensation, through the method of direct enforcement of the subject responsible for causing civil damage that can be fully quantified, unlike environmental damage whose characteristic is both its uncertainty and the difficulty of quantifying and fulfilling responsibilities.

In the following, we will try to identify and present for analysis some civil law rules that refer to certain concepts, aspects or elements concerning the environment. What we want to point out right from the start is that, if we make a summary interpretation and analysis of the texts that we will present and analyze, we observe that the current Civil Code is a legislation that does not take into account the provisions of European law instruments, those represented by the basic treaties of the European Union[2], which establish the priority directions and objectives aimed at sustainable development, promoting solidarity between generations and ensuring a high level of protection of the quality of the environment (Dogaru & Kajcsa, European Union Strategies and Policies in the Current Context of Technologization, 2021)[3].

We will start by mentioning the fact that there are inserted in the current Romanian Civil Code a series of notions and formulations, which by interpretation lead to a connection with those specific to the environmental legislation. Thus, starting from some basic legal concepts, such as those concerning assets, we identify by means of the provisions of article 539 para. (2) of the Civil Code, the inclusion in the category of

[2] The Treaty on European Union, also known as the Maastricht Treaty, signed in February 1992, which laid the foundations of the European Union, and the Treaty on the Functioning of the European Union (TFEU).

[3] TFEU, requires in its article 11 that all environmental protection requirements must be integrated into the definition and implementation of the European Union's policies and activities.

movable property and of "electromagnetic waves or assimilated to them, as well as energy of any kind (...)". In relation to some special provisions, we note that this provision does not comply with that of the law on energy[4], or of other special normative acts and European regulations in the field[5], for several reasons. What is relevant in the context of our approach is that, although the specificity of this category of goods is given by the gain of a category of persons involved, of those who participate in the energy market, the merit of this provision with reference to the environment lies in including in the category of movable property and electromagnetic waves or those assimilated to them, which complements the regulation with regard to electromagnetic pollution provided by the general law of the environment[6].

We are moving towards another text of the civil law, that of article 603, in which we explicitly stipulated the obligation of any owner to "respect the duties of environmental protection and ensuring the good neighborhood". Thus, we will analyze the two texts of civil law, in an attempt to identify those aspects that concern the environmental factors, their conservation and protection.

We show that the provisions of article 539 of the Civil Code reveal their importance in this equation by reference to those contained in article 1349 of the Civil Code which provide in the sense that: "(1) Every person has the duty to observe the rules of conduct that the law or custom of the place imposes and not to affect, through the actions or inactions its rights or legitimate interests of other persons. (2) The one who, having discernment, violates this duty shall be liable for all the damages caused, being obliged to repair them in full. (3) In the specific cases provided by the law, a person is obliged to repair the damage caused by the deed of another, by the things or animals under his guard, as well as by the ruin of the edifice. (4) The liability for damages caused by defective products shall be established by special law".

Leaving aside some inconsistencies related to terms and notions as well as the distinction between them, the relevant aspect that is inferred from the systematic interpretation of the two articles of civil law, consists in the fact that it is liable for damages caused by electromagnetic waves or assimilated to them, as well as energy of any kind, liable being any person who, through production, capture and transmission, has put such things in his service "regardless of the movable or immovable nature of their source" (Dogaru & Dogaru, Drept civil. Partea generează, 2021).

Furthermore, art. 603 of the current Romanian Civil Code, suggestively entitled "Rules on environmental protection and good neighborhood" provides as follows: "The right to property obliges to respect the tasks regarding the protection of the environment and ensuring the good neighborhood, as well as to the observance of the other tasks which, according to the law or custom, are the responsibility of the owner". If we refer this text to

[4] Law no. 123 of 10 July 2012 on electricity and natural gas, published in M. Of. No. 485 of 16 July 2012, republished in 2020 which establishes the regulatory framework for conduct activities in the energy sector in order to make the best use of primary energy resources under conditions of accessibility, availability, and affordability and in compliance with the rules of Safety quality And Protection of the environment.

[5] Directive 2012/11/EU of the European Parliament and of 19 April 2012 amending Directive 2004/40/EC on Requirements minimum security and health relating to the exposure of workers to the risks arising from physical agents (electromagnetic fields).

[6] EGO No. 195/2005 on Environment Protection recognizes the quality of pollutant electromagnetic radiation and its ability to cause severe damage to the environment.

the one in the Constitution of Romania republished (article 44 para. 7), which provides that: "The right to property obliges to respect the tasks regarding the protection of the environment and to ensure the good neighborhood, as well as to the observance of the other tasks that, according to the law or custom, belong to the owner", we note that the two are identical (Duțu, 2022). They stipulate both a *propter rem obligation,* which belongs to the holder of the right in question and which results from the mastery of some assets and obliges only in relation to the respective assets, as well as a legal-constitutional limit in the exercise of the right to property. And the idea conveyed by the text of the fundamental law is that the right to property obliges to respect the tasks related to environmental protection, the entire issue of fundamental rights being circumscribed to the framework of ecological requirements.

If we take for analysis article 603 of the Civil Code as part of Section I entitled "Legal limits of the right to private property", and we systematically interpret the provisions of article 555 para. (1), which provide that: "private property is the right of the owner to possess, use and dispose of an asset exclusively, absolutely and perpetually, within the limits established by law", with those of article 556 para. (2) of the Code, which establishes that: "by law the exercise of the attributes of the right to property may be limited", we deduce the existence of a limit established in the exercise of the attributes of the right to property, in the sense of the legal obligation to make, respectively, the owner's obligation to respect the tasks regarding the protection of the environment and the assurance of good neighborhoods.

Then, from the analysis and interpretation of the article 603 text of the Civil Code, we also deduce that it also establishes the obligation of the owner to compensations in those situations in which he did not comply with the tasks regarding the protection of the environment and ensuring the good neighborhood. Thus, this legal text of Section III Judicial limits (Terzea, 2021), entitled 'Overcoming the normal inconveniences of the neighborhood', provides that in those situations where the owner causes, by exercising his right, inconveniences greater than normal in the relations of the neighborhood, he may be obliged by the court of judgment, for reasons of equity, to compensation for the benefit of the injured owner, as well as to restore the previous situation when possible.

Using the same method of systematic interpretation, we will corroborate the rule inserted in the text of article 630 of the Civil Code with that of article 1353 of the Code, entitled Exercise of rights, which states that, "He who causes damage by the very exercise of his rights is not obliged to repair it, unless the right is exercised abusively", and with the rule in the text of Article 1381 of the Code, entitled The object of the repair, which provides in para. (1), that, "All damage gives rise to the right to compensation" (Mangu, 2019). The logic of legal interpretation shows us that the provisions of Art. 630 of the Civil Code do not set a judicial limit, although this is the sole article of Section III entitled Judicial Limits, but only a special case of liability. And, the civil norm from article 1353 concretizes the principle of abuse of rights regulated by the provisions of article 15 of the Civil Code[7]. This is the reason why the text of the legal norm of article 630 presents a case of abuse of rights, which entails the liability of the owner who has disregarded the tasks of protecting the environment and ensuring the good neighborhood, causing, by exercising

[7]Which states that "*No right may be exercised for the purpose of harming or injuring another or in an excessive manner and unreasonable, contrary to the good-beliefs".*

his right, greater inconveniences than normal in the neighborhood relations. That is why the competent court may order him to compensate for the benefit of the injured party, and to restore the previous situation when possible (Mangu, Dreptul la repararea prejudiciului cauzat printr-o faptă ilicită extracontractuală, 2019).

A somewhat paradoxical situation lies in the interpretation of the text of the legal norm in para. (2), article 630 of the Civil Code, which provides that, in the case of minor damages produced in relation to the need or usefulness of the owner to carry out the harmful activity, the court may approve such activities, but the person thus harmed shall be entitled to compensation. It is noticed that, on the one hand, the owner obliged by the fundamental and civil law, to respect the tasks regarding the protection of the environment and ensuring the good neighborhood and not to exceed the normal inconveniences of the neighborhood, appears to be absolved of these obligations, subject to the injured person being rendered out and put back in the previous situation. If we corroborate the text of article 602 of the Code which provides that the law may limit the exercise of the right to property either in the public interest or in the private interest, the parties being those who have the possibility to order by their agreement the temporary modification or abolition of these limits in their interest, with that of article 603 of the Civil Code, it follows that the legal limits in the public interest, such as tasks relating to environmental protection and ensuring good neighborliness, cannot be temporarily modified or abolished by agreement of the parties. On the other hand, the court will be able to temporarily modify or abolish the legal limits in the public interest, the owner being able to bear the overcoming of the normal inconveniences of the neighborhood during the neighborhood disorders through pollution-generating activities, in the case of a minor damage (such as, for example, noise pollution), which has the prerogative of consenting to such activities (Ungureanu & Munteanu, 2007).

We invoke in this context some inaccuracies between these provisions of civil law and environmental law[8]. We thus note that the civil legislator does not distinguish in article 630 between minor or major damage, as the law on environmental protection does (GEO 195/2005 in article 95), which obliges the polluter to compensation not for reasons of fairness, but by instituting objective civil liability, the one independent of fault, and of joint and several liability, forms of civil liability that give expression to the fundamental principle of environmental law "the polluter pays" (Dogaru, Quelques Principes du Droit de L'Environnement, 2018), and the possibility for the victim to claim full compensation for the environmental damage from any of the perpetrators (Dogaru, Dreptul mediului, 2nd Edition, 2020). Moreover, only the special environmental legislation includes among the harmful deeds generating civil liability, both the wrongful acts that can cause ecological damages and the legal facts that can constitute causes of ecological damage, based on the liability based on the idea of risk.

A commendable legislative initiative that has become a novelty in civil law is given by the exceptional regulation of cases of environmental degradation through pollution, for which the right to action is prescribed within a special long term of ten years. By article 2518 para. (3), the current Civil Code establishes this limitation period regarding the ecological damages, as a special term, as a result of the damage to the environmental values through illicit acts. Thus, the right of action regarding the compensation of the damage caused to the environment is prescribed within 10 years (Duțu, 2022) (Dogaru, Modalități

[8]Remember that at the level of foreign jurisprudence, such Inaccuracies were settled.

de reparare a prejudiciului ecologic, 2018). Probably, the stipulation of such a long limitation period for the compensation of the ecological damage finds its motivation not only in the educational and mobilizing function of the institution of the extinctive prescription, but also in relation to some aspects specific to environmental law. In the following, we will proceed to a systematic analysis of the relevant rules.

Special environmental legislation[9] that aims to prevent and remedy ecological damage through rules that oblige immediate action has the regulatory framework of environmental liability based on the "polluter pays" principle. The preventive measures in place shall be required to be proportionate to the imminent threat and capable of avoiding the occurrence of the damage, on the basis of the precautionary principle in decision-making and measures to prevent environmental damage. On the other hand, the remedies provided for in environmental rules must be proportionate to the damage caused and lead to the removal of the effects of the damage, taking into account the precautionary principle in decision-making. In relation to these regulated issues, what is obvious is that the special environmental legislation provides for extremely short time intervals for taking the necessary measures in case of imminent threats of damage to the environment or in case of its actual occurrence. That is why, taking into account the provisions of civil law and those of special environmental legislation with regard to the limitation periods of the right of action, it is necessary to find an explanation as to the difference between the 10-year limitation period for compensation for damage ecological and the extremely short time intervals provided for by the environmental legislation with regard to obliging the polluting operator to take the necessary measures. Another aspect related to the special limitation period of 10 years stipulated by the civil law, is that it does not find justification in the case of damage resulting from a diffuse pollution[10] or in the case of instantaneous pollution.

3. CONCLUSIONS

The environment with all its components is a value subject to legal protection, a special field that requires legal means to ensure its protection and the prevention against any impacts that may be brought to it, and if such impacts have occurred, their repair and restoration. Just the placement of environmental protection at the top of human priorities imposes the necessity and urgency of establishing legal regulations. If criminal regulations require the protection of the environment and society against ecological crime, those of civil law, even if they do not provide a specific regulation, provide instruments in the field of compensation for ecological damage.

The means or instruments of public law as well as those of civil law have proven to be able to decisively influence the issue of environmental protection.

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[9]EGO No. 68/2007 on environmental liability regarding prevention and environmental damage repair, updated in 2016.

[10]Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability regarding prevention and compensation for environmental damage, states that environmental liability is not an appropriate tool for extensive pollution and diffuse, since in its case it is impossible to establish the principles and the sources of environmental law.

The current Civil Code tried to adapt the provisions of the national civil law to the challenges generated by the exercise of subjective rights, the protection of the environment and the responsibility of the subjects who caused ecological damage.

Of course, by referring to the civil legislation of other states, but especially by referring to the climate realities we are currently facing, we can say that the environmental regulation offered by the current Romanian civil code is insufficient, with a note of generality and non-covering.

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