IS THE ROMANIAN CIVIL CODE TENDING TOWARDS GREENING? (II)

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ABSTRACT*: Not only the environmental legislation but also the criminal and civil one, represent firm instruments of environmental protection, through the attributions and responsibilities established in environmental issues but also through the responsibilities they establish in the prevention and compensation of ecological damages.*
In the last period, against the backdrop of increasingly aggressive environmental degradation, we are witnessing the development of legislation that establishes liability for damages caused to the environment, both under public law and civil law.
From the perspective of civil law, legal liability is a matter of compensation for damages caused to life, health and human integrity or to the property of victims of ecological damage as a result of people behaviour.
We pointed in the first part of our study that the current Romanian Civil Code does not include enough regulations regarding the environment and due diligence on the environment, or regulations that require compliance with subjective rights and requirements related to prevention, precaution and other principles aimed at environment protection. But it offers some specific tools in the field of ecological damage compensation.
During this paper we will try to point out some shortcomings of this civil legislation, such as, for example, those related to the principle of prevention and precaution, but also aspects regarding the obligation to inform the public in relation to the traded products and the services offered through the documents civil legal.

KEYWORDS: *precautionary principle; ecological damage; obligation to inform; civil liability.*
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1. PRELIMINARY CONSIDERATIONS

It is a reality that the current ecological crisis has its origin in the harmful activity of man on the environment, activity through which it was reached at a given moment to exceed all the thresholds of the ecological balance. These negative, often irreversible consequences of human aggression on the environment, as well as the irrational and

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unlimited exploitation of its resources, were the ones that raised the issue of prioritizing the need to protect nature and everything that composes it, of establishing responsibility and repairing the damage caused to it (McIntosh & Pontius, 2017). Of course, it remains regrettable that the beginning of the process of awareness of the need for environmental protection is concurrent with that of the ecological crisis. Anyway, the legal reactions to the reality of these ecological crisis, occurred both in international and community law, as well as in national legislation, which regulated the issue of legal liability for ecological damage, damage that causes its deterioration and, consequently, must be the object of repair. *Lato sensu*, there are two categories of ecological damage, namely: pure ecological damage, those caused to the natural environment, and ecological damage through ricochet, represented by those touches that affect the health, integrity and life of people and their goods.The pure ecological damage repairs takes place under environmental legislation, and the repair of ricochet damage is done under the conditions and according to the rules of common law.

As we have shown in the first part of the study, the issue of ecological responsibility is coordinated both by the constitutional texts and by the legislation that establishes civil liability and the one aimed at environmental criminal liability.

An extremely important and necessary step was the establishment of ecology as a constitutional value. This process, which had an impetus and a path supported by extremely relevant international documents in the field of environmental protection and sustainable development, as well as by the regulations at the European Union level, which drew behavioral lines for all environmental actors (Convention on Civil Liability for Damage Resulting From Activities Dangerous to the Environment, Lugano, 21 June 1993, European Treaty Series No. 150) (Dogaru, 2020) (Dogaru & Kajcsa, European Union Strategies and Policies in the Current Context of Technologization, 2021). Definitelly, the inclusion of environmentalprotection in the constitutional texts was alike motivated and driven by the recognition of its role and value, of the need to enshrine the right of people to a healthy environment, a process influenced of course, also by pollution dangers, by depletion of natural resources, correlated to the increasingly accentuated negative consequences of the phenomenon represented by climate change and global warming (Dogaru, Environmental change and its effects, 2017) (Dogaru & Kajcsa, Interrelationship between Globalization and Environmental Protection, 2011) (Dogaru & Dogaru, The Rights of Nature. A New Paradigm (I), 2022).

In the first part of this study, we showed that the general legal framework for protecting the environment and its ecosystems also through civil law means, but also of subjective ecological rights, is represented by the regulations at the highest level, those of constitutional source. Although, the statutory legislation was also very responsive to the signals given by the international regulations and those at the community level that became a priority for the European member states. In this way, a lot of important legal instruments in the matter of environmental protection and sustainability can be found at the level of national legislation with a special character and related ones.

Environmental civil liability is a special liability, which has become one of the most important and extremely popular tools in the pollution control and environmental risks, prevention and compensation for damages caused by polluters (Dogaru, Modalităţi de reparare a prejudiciului ecologic, 2018). The institution of liability for environmental crime has become one of the most important instruments in the environmental protection

mechanism, an instrument that involves the rehabilitation of the affected environment by applying sanctions to those concerned (Nemțoi & Ungureanu, 2021).

We also shown in the first part of the study that the legal norms of the Civil Code, does not regulate in a direct and express manner the environment issue, but they contain some specific instruments in the field of ecological damage compensation. Thus, through civil law instruments (such as the institution of property, tortious civil liability and the application of the principles of good neighborliness in case of pollution), it is possible to trening tortious civil liability, as a form of liability aimed at repairing ecological damages (Dogaru, Dreptul mediului, 2nd Edition, 2020).

The positive legal framework has been constantly supplemented with rules and regulations in the field of environment and ecological liability and repairing ecological damage, established at the European level and implemented in the national legislation of the member states. This type of specific regulations has some particularities, such as, for example, the fact that in matters of ecological liability, the institution of civil liability based on the idea of risk and guarantee is used,in order to guarantee the effective recovery of ecological damage caused by illegal human activities.

Of course, in the same equation can be included the fundamental principle of environmental law "the polluter pays" can be caught, a historical principle, which pursues to establish civil liability and full ecological restoration. The recent EU Special Report no. 12/2021 of the European Court of Auditors entitled „The polluter pays principle. Inconsistent application across EU environmental policies and actions", defines this principle. Many environmental regulations established this principle. For example, the Waste Directive of the European Union (EU) 2008 refers to the polluter pays principle as "a requirement that the costs of disposing of waste must be borne by the holder of waste, by previous holders or by the producers of the product from which the waste came". Enshrining this basic principle through which polluters must pay for people's right to a healthy environment or compensate them for giving up this right, it is found in laws intented to ensure its mandatory and unconditional application. A principle that raised many controversies related to polluters: if they are the producers of products that affect the environment, if they are the users of natural resources, if they are the consumers of products that generate waste, are the industrialized countries that have a high contribution to greenhouse gases in relative to the poor etc. With all the theoretical and practical gaps of the idea behind this principle, that of holding polluters accountable, as well as its implementation, it remains a basic principle of environmental policy to guide sustainable development. In the same manner, another fundamental principle, that of the right to a healthy and sustainable environment can be mentioned, a principle which establishes the respect of this extremely important subjective right both in setting environmental legal precedents for a number of issues, as well as in creating obligations for states in applying environmental legislation and in controling the phenomenon of pollution to ensure environmental protection, human life and health. We refer here to recent documents, such as UN Human Rights Council, Resolution 48/13 adopted on 8 October 2021, "The human right to a clean, healthy and sustainable environment", and UN General Assembly's adoption on 28 July 2022 of Resolution 76/300 which also recognises the right to a clean, healthy and sustainable environment as a human right, and calls to scale up efforts to ensure such environment for all (Cima, 2022). This principle entitles its holders to act in court any public authority or polluter, for the repair of ecological damage (Jones, 2018).

Of course, the civil legal rules will be applied in the field of liability for environmental damage or harm, by adapting to the particularities of environmental legal relations.

We will note also that, regarding the civil liability field for ecological damages, is made appeal tp the institution of tortious civil liability, which is regulated by the provisions of article 1349 and the following from the new Civil Code, which establish as an exception, in addition to civil liability for one's own act the liability for acts of another.

At the same time we show that, among the forms of tortious civil liability for indirect acts, have applicability in the field of environmental law, the civil liability for damage caused by things (consecrated by article 1376 of the code), the liability of principal for acts of agent (stipulated by article 1373), the liability for damage resulting from the ruin of the building (article 1378 of the code), and liability for the damage caused by animals (article 1375 of the Civil code).

2. THE CONTRIBUTION VERSUS DEFICIENCIES OF ROMANIAN CIVIL CODE IN ENVIRONMENTAL MATTERS

In the first part of this study, we showed that the new Romanian Civil Code, entered into force in 2011, although it has some references, it does not include enough regulations regarding the environment and *due diligence* on the environment, or regulations to inforce compliance with subjective rights and requirements related to prevention, precaution and other principles aimed at protecting the environment and its sustainability (Dogaru & Dogaru, Special Liability for Ecological damage caused in an international context, 2021).

This, despite the fact that the Romanian civil legislation had as a point of reference not only sectoral regulations but also a lot of coordinates established by the basic treaties of the European Union, which offers in their content a significant number of articles to the issue of environmental protection and sustainable development. Thus, we recall in this context article 3 of the European Union Treaty which sets out that the European Union acts for the *sustainable development of Europe* based on balanced, as well as for "a high level of protection and improvement of the quality of the environment", permanently promoting the values and interests of its citizens, which it undertakes to protect (article 2). Another established commitment is related to ensuring peace, security and sustainable development of the planet, eliminating poverty and protecting human rights. And the text of article 11 of the Treaty on the Functioning of the European Union (TFEU) provides that "Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development". By the way, Title XX of the Treaty contained in Part Three, entitled "The internal policies and actions of the Union" is reserved for the environment.

In the following, we will try to point out some aspects related to the environment who did not receive the attention or regulation of the Romanian civil legislation (Duminică & Iancu, 2021).

Thus, we will indicate one of the very important aspects, but which has remained unregulated in the current Civil Code, namely, that concerning environmental preventive civil liability. It's about civil liability with a preventive character, aiming at legal relations in which, as a result of committing lawful acts against nature and environment, there is a possibility of future ecological damage. Certainly, taking into account the limits of human

knowledge, the certainty of future damage does not exist, reason why the precautionary principle is regulated by legislation.

Precautionary principle, which emphasizes the idea of safety and prudence, was introduced for the first time by the Rio Declaration on Environment and Development, and became over time a basic reason for numerous other international documents, declarations, agreements and treaties as well as for national legislations in the field of sustainable development and environmental protection. The precautionary principle is one of the principles on which the European Union policy on the environment field is based on the jurisprudence (see the Judgment of the Court of Third Chamber of 11 September 2002, cause Pfizer Animal Health SA v. Council of the European Union), and it has been gradually included into the European Union legislation and consequently into the national legislation (in line with the first subparagraph of Article 191 para.2 of the TFEU), as well as into others international legal instruments.

Enshrined in environmental law, the precautionary principle is understood in different ways, being considered by critics as a tool against progress by limiting human activities, and by supporters, as an important tool in stopping the serious harm and damage of human health and of environment, an answer to the search for a new type of ethical responsibility aimed at the order of nature. Despite a more unified approach and understanding of its meaning and effect, this principle included in many international environmental instruments behaves one of the most controversial developments in international environmental law (Sands, 2018) (Duşcă, 2011).

The precautionary principle is part of the triad of founding principles for environmental law (Dogaru, Dreptul mediului, 2nd Edition, 2020) (Dogaru, Quelques Principes du Droit de L'Environnement, 2018), triad represented by "the polluter pays" principle, the prevention and precaution principles, but which are certainly, principles with distinct meanings and effects. Thus, if the "polluter pays" principle implies a polluter who, through his voluntary or involuntary action, causes ecological damage that have to repair, the prevention principle implies the obligation to act before the damage occurs, while, the precaution principle implies anticipation, a risk of damage, a damage whose risk of occurrence is uncertain (Sadeleer, 2010).

The transition from repairing ecological damage to their prevention, that is, from risk as a fatality, to predictable and statistically probable risk, has become a trend nowadays (Dogaru, Objectification of civil liability for ecological damage. Sectorial aspects, 2020). Through this principle pursues to be legally punished those people whose behavior does not overlap on the new existential situations determined by the unprecedented and unstoppable development of science and technology, a situation due to which predicting the future and the new risks generated is almost impossible.

But the question that arises is whether the precaution and prevention principle agains negative environmental effects caused by human activities, as an expression of liability based on uncertainty, may be a future of civil liability. Being a principle of anticipation, precaution covers only those anticipated preventive actions, in the context of risk uncertainty and applies only if the damage is not caused, and the probability of its actual production is not proved. This is how, the attempt to frame preventive environmental liability in the pattern of civil liability encounter certain difficulties represented by the lack of damage, of causality, but also the lack of an act that is neither illegal nor harmful.

From a legal point of view, both the tortious civil liability and also the correlative compensation are irrelevant in those situations where the damage is uncertain and when the risk realization can determine, generate such consequences, so that neither the repair nor the return to the previous situation can not take place in any form, which is why the ecological damage can be extended over time, with unpredictable dimensions and incalculable consequences.

There are only some reasons why it is considered that the principle of precaution does not brings together the conditions of a principle of responsibility, this having only the prerogatives of a procedural principle by which the decision-making process by the judge is oriented, which of course, for the assessment of responsibility, will be required to take into account the positive provisions of measures on preventions pollution and environmental degradation. As an environmental principle derived from the principle of prevention, the precaution is justified only in contexts where scientific data does not accurately highlight the ecological danger of a certain activity, context that requires that the environmental decision must be in the sense of not starting that activity because the danger of environmental degradation could be too big.

In conclusion, we can say that the impact of the precautionary principle is under a general legal rule of conduct, a rule that imposes the idea that each person is responsible for his own patrimony and his own will. It is the reason why this principle relating to the environment seems to have applicability only on certain category of subjects of civil legal liability.

Uncertainty situations regarding the classic principles and rules of tortious civil liability are the consequence of the multiple socio-economic phenomena faced by the increasingly globalized society, a society in which the new techniques and very advanced technologies still remain under the sign of uncertainty. These are realities that generates considerable changes in tortious civil liability, a liability whose basis is not known if it is the fault of the person, the risk of the activity for the environment, the endangerment of human health and the environment or the circulation of defective or dangerous products.

There are a lot of findings under which the preventive legal liability is considered to be the hard essence of ecological liability, an assessment that finds its basis in a series of ideas (Duşcă, Dreptul mediului, 3rd Edition, 2021) (Duşcă, Răspunderea preventivă – formă a răspunderii ecologice (District Court 1, Bucharest, civil sentence no. 864 of June 24, 2009), 2011).

We further point out that, the provisions of art. 1386 of the new Civil Code related to the damages repairing, provide that, as a rule, the repair must be done by restoring the previous situation, and when this method it is not possible or when the victim or the injured party is not interested in this form, it can be replaced by the reparation through monetary equivalent, in the form of the awarding of compensation established by the agreement of the parties or, in the absence of such an agreement, by a court decision. Not only the form but also the amount of compensations could be established conventionally or judicially. It follows that this legal text regulates two ways of damage reparation, respectively, reparation by restoring the previous situation, like a basic rule, and reparation by paying compensation.

With incidence into environmental field, the current Civil Code, through article 2517, regulates the prescription of the civil action for the reparation of the damage caused by a delictual act, within the general term of 3 years, with two exceptions, those in which the

term is 10 years, respectively, when the damage is caused by torture or barbarism acts, sexual assaults or violence committed against a minor or a person unable to defend themselves, as well as in the situation of ecological damage (Pop, 2010) (Nicolae, 2010) (Dogaru & Dogaru, Special Liability for Ecological damage caused in an international context, 2021).

Another aspect that is omitted from the regulation of the new Civil Code, is the one aimed at the seller's obligation to inform the buyer in a complete manner about the essential characteristics of the good that is traded, in consideration of his life and health protection. We show here that, through the provisions inserted in article 3, regarding the general application of Civil Code, all private law relationships, those regarding individuals, family relationships and commercial relationships are regulated (Dogaru & Dogaru, Drept civil. Partea generală, 2021).

But, remain unregulated the legal regime distinctions according to the professional and non-professional quality of the persons involved in the obligatory legal relations, such as, the sales contracts. So, only the seller's obligations related to the transfer of ownership, delivery of the good, guaranteeing the buyer against eviction and defects of good are regulated, without any mention about seller's obligation to inform consumers, as non-professional parties. We want to believe that this gap is assigned to the legislation regarding consumer protection, which establishes the obligation to protect citizens in their capacity as consumers, by ensuring unrestricted access to products and services, their complete education and training about their essential characteristics, of defending and ensuring the rights and legitimate interests of individual persons against unfair practices, but also their participation in substantiating and making decisions interesting them as consumers. Obviously, the current environmental legislation also outlined one of the attributes of the human right to a healthy and safety protected environment, namely, the public access to information on the environment regarding the activities that involve environmental consequences (Duțu, 2020).

Taking into account all these aspects, but also the provisions of the Civil Code, article 2, which establishes its content, as a set of rules that represent the common law for all areas to which the letter or the spirit of its provisions refer, we agree it is appropriate the regulation of seller's obligation, consisting in full information of buyer about the essential characteristics of the good which they trade. Because exercising the right to information on the environment, as a human right, fulfils an important role in protecting the quality of the environment, just like a healthy environment is able to help ensure the full exercise of human rights (Julie Fraser, 2022) (Dogaru, Preserving the Right to a Healthy Environment: European Jurisprudence, 2014).

3. SOME FINAL CONCLUSIONS

Certainly, an Environmental Code would comprehensively in an exhaustive manner the entire environmental issue, from the rules that establish behavioral models to the incidence of environmental protection principles, but also to civil liability for ecological damage.

Regarding the latter aspect, the issues related to civil liability for ecological damages are analyzed by reference to the provisions of article 1349 of the new Civil Code, which constitutes common law in the field of tortious civil liability.

With all advanced charater of the new Civil Code provisions, their connection with the field of civil liability for ecological damage remains purely incidental. Thus, the field regarding environmental preventive civil liability remains unregulated, because the impact of the precautionary principle is attributed to a general legal rule of conduct, a rule that imposes the idea that each person bears responsibility for his own patrimony and for his own will, so that, the precaution regarding the environment seems to have applicability only on a certain category of civil legal liability subjects.

Also, another very important issue that was required to be regulated by civil legislation it's that one concerning the obligation of the seller to fully inform the buyer about the essential characteristics of the sold good, of course, taking into account the protection of the consumer's life and health, as holder of the right to a healthy and safety environment.

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