Considerations on liability for environmental damage

Gheorghe DURAC, Ph.D
„Alexandru Ioan Cuza" University, Iasi, Romania
gheorghe.durac@uaic.ro

Abstract: *In this study, we wish to discuss and find an answer to the multiple aspects specific to civil liability for ecological damage. In environmental law, there is a tendency to institute objective civil liability supported by the idea of risk, as separate from guilt. From the viewpoint of the specificities of this branch of law, we will analyse in detail the general conditions of criminal civil liability for ecological damage. We will define the notion of ecological damage and we will study methods of evaluating and repairing ecological damage. In order to conduct this research, we will take into consideration internal law on this subject, the dispositions of international conventions for the protection of environmental factors, as well as the legislation and jurisprudence in various states.*

Keywords: *civil liability; environmental protection; ecological damage; sanctions.*

Introduction

The multiple aspects related to social liability for ecological damage are very important from a practical and theoretical perspective, which is why we have considered it opportune and interesting to approach this topic, which is the subject of the present study. In the field of environment, the issue of civil responsibility and liability - both legal and social - has, for now, a rather limited scope and span, although saving nature should be a major concern for everybody, considering that by destroying the environment, man degrades himself.

1. General considerations on the legal liability in environmental law

Legal liability - in general - is the set of rights and related obligations that appears as a result of an illegal action and is the framework for state constraint [1]. The institution of legal liability aims to insure the stability of social relations and to stimulate society members to comply with the applicable norms. Treated in the various law branches, legal liability is differentiated according to the actions that trigger it, their legal regime, the sanctions and purposes aimed by the law-maker.

The issue of legal liability for the damages caused because of the deterioration of the environmental factors was timidly approached in the legal doctrine and practice, also because in the field of environment, there is no institution of ecological liability yet, with the main role of preventing and repairing the damages caused to the environment.

In the field of environment, the legal norms should contribute to achieving a concrete purpose, consisting in preventing pollution of any kind, preserving and improving life conditions on Earth. Within the measures (legal ones including) that concern the protection of nature, special emphasis should be placed on preventive and ecological reconstruction measures, since often a destroyed environment cannot be brought back to its normal state.

Often, applying sanction (even severe ones) is not enough to prevent the deterioration of environmental factors. This is why environmental legislation must establish a series of strict requirements for performing any activity that implies risk factors for the environment. We refer, first of all, to the procedure of authorising the economic and social activities that have an impact on the environment, and responsibility for the impact study. We also take into consideration other levers - economic and fiscal - for environmental

protection, such as: the price policy in favour of preserving the environment, subventions and tax exemptions, pollution grants, etc.

Starting from what already exists in the legislation in the field in Romania as well as in other European countries, we can foresee room for discussions in the matter of liability, where environmental law presents deviations from civil law or criminal law, for example, as common law. These deviations, as well as the existence of numerous lacks, require jurisprudence to come with novel interpretations in order to insure the efficiency of the legal act. In this sense, we aim to identify the specificities of legal liability in environmental law in relation to its classical meaning, and of the mechanisms that have determined the switch from a subjective liability based on guilt to an objective liability, according to the dangers produced by the end result.

A feature of environmental law that we can mention is the fact that in this respect, legal liability comes into play in case a prejudice was caused through the deterioration of the environmental factors, as well as in case that, although the environment has not been polluted, illegal actions have been performed nevertheless, which infringe environmental law norms, actions that can create favourable conditions for pollution [2]. Therefore, legal liability falls in the charge of the polluter who is guilty of deteriorating environmental factors, as well as in that of the public worker or of any other natural or legal person who, although they do not cause environmental pollution through their actions, still infringe environmental legislation.

We can thus say that in environmental law, the notion of legal liability as a much broader meaning. Legal liability in this matter aims not only to punish the persons who are guilty of polluting environmental factors or those, who, although they do not damage the environment through their actions, still infringe environmental legislation, but also taking and complying with all the measures that contribute to insuring the optimal conditions for the performance of all the economic and social activities by all state persons or bodies, public or private institutions, so as to minimise the risk of pollution.

We consider that the role that legislation has to play in order to protect environmental factors is first of all preventive. The people, the economic agents, the governmental and non-governmental organisations, must adopt a behaviour that would ensure and guarantee a healthy life environment and avoid as much as possible all actions with a pollution risk. As we know, it is much easier and less costly to prevent the environmental factors to their initial state and to normal parameters.

At the same time, environmental law norms should also provide repair. They should also include dispositions that could make it possible to repair the prejudices caused by pollution to the environment and to the people. In this respect, as a guarantee for repairing the damages to the environment, the various funds that are constituted - in anticipation - to improve the various environmental factors are useful [3], as well as the various insurance systems that apply in this respect. In this sense, we mention: the national environmental fund, the land heritage improvement fund, the water fund, the hunting protection fund, the special fund for the development of the energy system, and re-forestation bonuses.

Also, naturally, environmental legislation should also sanction, needing to impose, in our opinion, harsher punishments than those stipulated at present, especially for deeds that seriously affect various environmental factors, sometimes irreversibly.

In order to preserve and protect the environment, in case illegal actions have been performed that brought prejudices to the environment or to people, we consider it opportune to broaden the sphere of persons and bodies to which the law grants active process legitimacy, and here we include non-governmental organisms, which as we know play an important role in sensitising public opinion and decision factors with regards to the danger of various human activities with a risk for the environment.

2. Supporting civil liability and application fields in environmental law

Criminal civil liability for the prejudices brought to environmental factors can be triggered by resorting to civil law means, such as: the institution of criminal civil liability and applying the principles of

good neighbourhood in case of pollution. The general legal framework for the protection, through civil law means as well, of the subjective ecological rights is generated by constitutional regulations.

This general framework is also normally completed by the new regulations in the field of environment and of repairing the damages brought to it. In this respect, the legislation of the European Union and international conventions on this subject resort to the institution of fundamental liability based on the idea of risk and guarantee, and in order to warrant the effective recovery after the damages, the system applied is that of constituting insurance and repair funds dedicated to the victims that suffered damages as a result of ecological accidents caused by human activities. In the same order of ideas, we consider that the principle „the polluter pays" has to become a fundamental law principle, which should be sacralised in laws meant to insure its compulsory and unconditional application. At the same time, each individual has a subjective right to the environment [4], whose respect can only be insured by the efficient protection of all the environmental factors. Any infringement of this absolute and inviolable right entitles the owners to sue any public authority or the polluter, as the case may be, for repairing the damages caused to the environment and, as a consequence, to their own selves. Also, in order to preserve the environment, irrespective of who is victim of ecological prejudice, non-governmental organisations have equally the right to sue [5].

Finally, we consider that civil law norms will apply in the subject of liability for ecological damage, adapting to the specificities of the legal environmental law relations.

In the field of liability for prejudices caused to the environment, there are no special regulations. Therefore, in order to establish liability in case ecological damages occur, it is called upon the institution of criminal civil liability regulated by the New Romanian Civil Code, art. 1349 and the following. These law texts consecrate, besides liability for someone's own (direct) action, liability for someone else's actions (indirect), thus taking criminal civil liability beyond the limitations of one's own deeds.

Of the forms of criminal liability for someone else's actions, we believe that the following may apply in the field of environmental law: liability for damage caused by things (art. 1376 of the New Civil Code), liability of the doer for the supposed doer (art. 1373 of the New Civil Code), liability for ruining an edifice (art. 1378 of the New Civil Code), and liability for damage caused by animals (art. 1375 of the New Civil Code).

In order to justify the extension of criminal civil liability beyond the limitations of one's own deeds, specialised literature resorts to different supports, which are subjective as well as objective.

Specific to environmental law, it is possible to have ecological damage as a result of illegal actions – which triggers subjective liability, based on guilt - as well as a result of committing, of performing an allowed, legal, action - which generates objective liability, based on the idea of risk [5].

In practice, it is rare that subjective liability is applied for ecological damage. The victim of such prejudice should prove that damage has been caused to them through an illegal action, that there is a causal relationship between the action and the prejudice, and that the author of the illegal action is in fault. Someone prejudiced by pollution, for instance, would find themselves in a very difficult situation, having to prove the author's guilt as well as the author's identity, and the difficulty is increased by the fact that a diversity of pollutants exist that spread in different manners and cause multiple types of contaminations.

We consider that in the case of civil liability for damage caused by hunting is regulated by subjective liability based on guilt. By interpreting art. 14, paragraph 1 of Law no. 407/2006 of the hunting fund and game protection, we get the idea that the responsible persons are, as the case may be, the game fund manager or the central public authority with attributions in forestry. According to the second paragraph of the same article, for damages caused by hunting strictly protected species, the compensations are supported first of all from the game protection fund, and this provision leads us to the conclusion that an objective civil liability can be triggered in this case.

In the old regulation, besides proving the guilt of the person called to answer, the injured had to also prove that they have fulfilled their own respective obligations in order to insure the security of the goods that have thus been destroyed, but following the modification and later the abrogation of Law no. 103/1996, this provision has been excluded, thus eliminating an additional condition that had to be proven in order to trigger criminal civil liability.

We signal that in the case of international liability for ecological damage, the legal basis of liability usually consists of guilt imputable to the state who is the author of cross-border pollution [3]. At an international level, it is often avoided to acknowledge and apply the guilt-free liability of the respective states, preferably resorting to a series of legal subterfuge (for example, the equity rule is called upon).

As an exception, objective international liability for risk is accepted in certain situations: for damage caused by space objects, in the case of prejudice resulted from the peaceful usage of nuclear energy, in the field of damage caused by sea pollution with hydrocarbon, in the hypothesis of cross-border pollution caused by waste. The convention concerning civil liability for damage resulted from exerting dangerous activities for the environment, adopted by the Committee of Ministers of the Council of Europe and open to be signed in March 1993, opt for objective liability, directing liability towards the performer of dangerous activities.

In internal law, there is a tendency towards instituting objective civil liability based on the idea of risk. This is required taking into account the specificity of ecological damage: the need to urgently repair the damage, the difficulty (sometimes even the impossibility) to repair the prejudice, difficulties in establishing the quantum of the damage, the occurrence of chain effects for a long time, etc.

Also, civil liability for risk and implicitly the institution and perfecting of an appropriate insurance system will determine a stimulation of a diligent and prudent attitude towards the environment, and the rational usage of all the environmental factors [3].

We consider that it is correct to institute an objective civil liability based on the idea of risk if we take into account the principle of equity and justice, according to which any activity that can engender profit should also include the guarantee of repairing the prejudice caused to the environment by the person obtaining profit from performing the respective action. Moreover, it is not necessary for the damaged to prove the guilty attitude of the author.

The specificities of civil liability for ecological risk are also stressed by the advantages of insuring a more effective protection of environmental factors. Thus, hypotheses in which liability cannot be triggered are excluded, and the victim is always compensated. At the same time, of the cases of exemption from liability, only acts of God can be accepted, and not even those in absolute.

Ecological risk also presents a series of specificities. In this sense, pollution in all its forms is a permanent danger and it can be very serious, if we remember that its negative effects occur slowly and for a long time, often breaking the limits of natural balance. The negative effects of pollution are not always controlled and corrected at the opportune moment, as sometimes they get out of control, with catastrophic and irreversible consequences. Pollution affects the entire natural system, its effects propagate in a chain, deteriorating environmental factors one after another.

Considering the increased safety, the system of civil liability for risk has also been adopted by Romanian law-makers through the emergency Order no. 195/2005 concerning environmental protection. This normative framework regulates (in art. 95 paragraph 1) the form of objective liability (independent from guilt) for all ecological damage, and in case that the prejudice has been caused by a plurality of authors, their common liability is instituted. This insures the application of the principle that the "polluting pays" and the possibility to repair the prejudice, insuring enhanced protection to the victim of ecological damage.

A special regulation exists in the case of civil liability for nuclear damage. Civil liability in this field is subject to a legal regime instituted by the Geneva Convention regarding civil liability for nuclear damage, in 1963, to which Romania joined through Law no. 106 of 1992, whose provisions will be corroborated with the dispositions of Law no. 111/1996 regarding the safe performance of nuclear activities.

The provisions of these normative acts have instituted a series of principles that refer to the field of civil liability for nuclear damage, such as: objective and exclusive liability, directing liability towards the operator, the obligation to constitute financial guarantees, the obligation to insure, and others.

The seriousness of the potential nuclear damage and the difficulty of evaluating the repair of such damage has imposed instituting severe safety norms in the nuclear industry and at the same time an international uniformity of the special system of civil liability in this field.

Another specificity that we can mention is that in the nuclear field, the preserved causes that are exempt of liability are only exceptional nuclear catastrophes, armed conflicts, hostilities, civil war or revolts.

Several specific elements also exist in what concerns civil liability for damage caused by aircrafts, whose special regulation can be found in the Romanian Air Code (Law no.130 of July 21, 2000). In this field, the instituted liability is also objective and independent from guilt.

We consider that the sphere of prejudices brought to the environment also includes those caused by aircrafts, and in this sense it is enough to mention the sound pollution caused by aircrafts on the ground, upon taking off or upon landing.

3. The notion of ecological damage

In order for criminal civil liability in the field of environmental protection to be accepted, it is necessary to cumulatively meet the following elements:

- an illegal action has been performed, which caused ecological damage;
- there was some ecological damage;
- between the illegal action and the damage, there is a causality relation;
- the author of the illegal action is guilty;

Although Emergency Order no. 195/2005 concerning environmental protection with regards to civil liability for an ecological prejudice instituted a new special regime, in principle the victim will have to prove the fulfilment of the four general conditions listed above.

In what follows, we will analyse, under the aspect of the specificities of environmental law, one of these conditions - ecological prejudice or damage.

In the attempt to define the notion of ecological damage, the following question arises: who can be considered to be the victim of ecological damage - man or his environment?

Of course, if we consider man as an element (a very important one) of environment, affected anyway (directly or indirectly) by the prejudices caused to the natural environmental factors, the victim of ecological damage is the environment. When we say this, we take into consideration the environmental legislation according to which the environment is made up of the "set of natural conditions and elements of the Earth: the air, the water, the soil and underground, all the strata of the atmosphere, all the organic and inorganic matter, as well as living creatures, natural interacting systems comprising the previously mentioned elements, including material and spiritual values".

But we can also say that man is not only a victim of ecological damage, since he is himself the author of the degradation of the natural factors of the environment; he is the victim of his own action.

According to one opinion, "ecological damage is the damage caused to persons and goods by the environment where they live, or the prejudice caused through the natural environment" [3]. Thus, in such a theory, man is the victim of the damage and the environment is considered to be the cause.

In a different opinion, ecological damage is considered to be the prejudice caused by man to the environment. Ecological prejudice would be, in this perspective, the result of damages brought to natural factors by pollution [6].

Another author defines ecological damage as "any damage that is directly caused to the environment, considered as independent from its repercussions on persons and goods" [7].

In supporting another idea, it is suggested to acknowledge, for each individual, a subjective right to the environment, which would allow enough protection for all the environment factors considered as "res communis" [4].

Finally, in a general formulation, ecological damage is considered to be "the prejudice that harms the entirety of the elements of a system and which, because of its indirect and fuzzy nature, does not allow constituting a right to repairs" [8].

Synthesising the multiple definitions given to the same notion, we can draw the conclusion that ecological damage, through the natural features of the environment, have a series of specific characteristics, of which we mention:

- the reversibility of the negative consequences brought to the environment;

- the cumulative effects of pollution, which affects in a chain reaction all the natural factors of the environment;

- the fuzzy nature of ecological damage, both in what concerns their manifestation and establishing the causality relation;

- all these are reflected upon the individual, following their effects on the natural factors.

4. Evaluation and environmental compensation for damage

4.1. ***Evaluation of environmental damage.*** In regards to the evaluation of ecological damage, a series of difficulties arise, due to the impossibility to know all the elements and conditions that lead to them and at the same time, the fact that numerous natural elements of the environment, once deteriorated, often irreversibly, have an incommensurable value.

Until now, no method of maximum efficiency has been found to evaluate ecological damage. In any case, it is advisable that negotiations for the evaluation of ecological damage to involve the state – through its bodies - the polluting, the victims, the representatives of bodies with tasks in environmental protection, non-governmental environmental organisations, etc.

From the analysis of American jurisprudence, four methods have been retained for the evaluation of damage caused to the marine environment:

- computing the replacement value of the damaged marine organisms;

- evaluating the cost of restoring to the previous state;

- resorting to a flat-rate evaluation;

- evaluating the cost of compensation by restoring a surface equal in size, in the neighbourhood of the polluted area [3].

In order to establish the extent of the ecological damage, several paths have been drawn [5]. First of all, it was noticed that only one category of ecological damage can be relatively easily evaluated from a financial perspective, and that is the damage caused to the integrity of the persons, goods, or commercial activities.

In some situations, damage caused to goods outside the civil circuit should also be taken into account. For instance, prejudice caused to the marine environment should be considered losses for fishing or tourism activities. Most advantages refer, though, to the financial evaluation of the damage, a method that implies setting benchmarks in case natural goods or species are destroyed.

4.2. ***Ecological recovery of damages.*** In what concerns repairing ecological damage, difficulties often arise, determined by the fact that sometimes the prejudice cannot be repaired in nature, or the repair is unpredictable, or there are issues in determining the person who should answer, or in identifying the victim.

In order to repair an ecological prejudice, two possibilities exist: socialising the reimbursement for the damage, which allows an automatic reimbursement of the victims or identifying the author – in order to force them to pay repairs – by establishing a causality link, which is often difficult to achieve, especially in the case of a plurality of potential damage sources or when the prejudice is caused for a longer time.

Difficulties also exist in the attempt to designate the victim, and often the latter is forced to act in order to repair the damage. Analysing the legislation and jurisprudence in various countries, we draw the idea that that the legitimacy for defending interests in ecological matters can be held by persons who invoke their own physical harm or the harm of a patrimony item, those authorised to manage the various environmental elements, and non-governmental organisations.

In all situations, it is preferable to repair the prejudice in nature, but unfortunately re-establishing the previous situation is not always possible. For this reason, repair through an equivalent is normally called upon, through the payment of an amount to be used for the ecological reconstruction of the affected environment.

In the field of environmental law, we can speak of several specific forms of prejudice, more specifically: non-financial prejudice, salvation measures, random damage, and development prejudice [3]. Non-financial prejudice is either a loss of benefit or deprivation of usage.

The notion of "salvation measure" concerns the aid given by non-affected third parties in the case of an ecological catastrophe. The concept of random damage refers to the hypothesis of repairing a damage that has not occurred yet but that is predictable, and therefore certain (for instance, the future disappearance of a natural resource).

Development prejudice is also founded on risk theory. Any person who obtained profit, determining such risk, must also assume the resulting consequences.

Conclusions

In a different order of ideas, we consider that the right to repair is legally supported not by the behaviour of the author of the ecological damage but in the right of each person not to be deprived of the value of a good or of a profitable situation by the normal state of the environment where he or she lives.

The task of the proof referring to the existence of criminal civil liability elements falls upon the suer, who normally is the victim of the ecological damage.

Speaking of proving a legal action (stricto senso), any proving means is allowed, including bringing witnesses.

Special difficulties can be foreseen in proving guilt, since it is an internal, psychological element. Due to the subjective nature of this element, proving it directly is nearly impossible. What can be proven is only external behavioural elements, the author's action and the illegality of the deed, any location and time circumstances, as well as the personal circumstances of the author. At the same time, the author of the prejudice has the right to prove the contrary with regards to the facts and circumstances that can clear his or her guilt.

In what concerns probation, expertise can be used to establish the ecological damage and the causality relation between the deed and the prejudice, in order to define the quantum of the repairs.

Finally, we consider that besides instituting a special legal regime, efficient for criminal civil liability in the field of environmental law, it is also necessary to have a policy of the states, which should encourage harmony between man and nature and promote efforts to prevent and eliminate the damages caused to the environment.

References

[1] Durac Gheorghe, Civil Law. General theory of obligations, (Drept civil. Teoria generală a obligațiilor) Dimitrie Cantemir Publishing House, Targu-Mures, 2000, pp. 65-66.
[2] Ernest Lupan, Environmental protection treaty right, (Tratat de dreptul protecţiei mediului) C.H. BECK Publishing House, Bucharest, 2009, p. 357.
[3] Duţu Mircea, Duţu Andrei, Environmental Law, (Dreptul mediului) C.H. BECK Publishing House, 2014, pp. 134-214.
[4] Gilles Martin, Indemnisation often dommages ecologiques, Paris, 1977, p. 261.
[5] Daniela Marinescu, Treaty of environmental law, Edition IV, (Tratat de dreptul mediului, Ediţia a IV-a), Universul Juridic Publishing House, Bucharest, 2010, p. 624.
[6] Patrick Girod, La reparation Ecologique du dommage, THES, Paris, 1974, p. 13.
[7] Francis Caballero, Essai sur la juridique Notion of nuisance LGDJ, Paris, 1981, p. 293.
[8] Michel Prieur, Le droit de l'environnement, 3eme édition, Ed. Dalloz, Paris, 1996.