

ENVIRONMENTAL DAMAGE, AN ESSENTIAL ELEMENT OF CIVIL LIABILITY FOR ENVIRONMENTAL AND LIFE PROTECTION

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Abstract.

Ecological prejudice represents the essential element of civil liability, the condition without which illegal acts would not cause liability of the prejudice originator, drawing perhaps another type of liability. In legal reports that regard life and environment protection, the prejudice has specific characteristics which created a dilemma in what regards doctrine and judicial practice, creating debates about the notion of "pure ecological prejudice" and also whether these specific characteristics give birth to some other type of liability, as common law civil liability seemed insufficient. The hereby study follows the notion of "ecological prejudice" and the ways this notion is regarded and compared by doctrine and national legislation in order to follow the specific characteristics of the ecological prejudice and to try to answer the question whether classic civil liability would be sufficient in the domain of liability for ecological prejudice or some sort of autonomous liability should be created which to satisfy the demands of this specific domain.

Keywords: ecological prejudice, civil liability, dilemma, environment

INTRODUCTION

Environmental education, in an era when humanity willingly and unwillingly is destroying their home planet, adding a daily negative dosage of waste to the environment, must be present as an important chapter of any domain of activity, starting with the simplest, daily activities, to those characterized by major risk. The phenomenon of environmental pollution is described as an abnormal structure or percentage of components in the environment and/or foreign substances that alter the health of human beings or create discomfort through their direct effect on people or the increased concentration of it and the period of time they affect the people. Pollution is one of the fundamental issues of humanity nowadays and it's the direct consequence of the ecological imbalance between man and nature (Taban, M., 2008).

In environmental law, liability has become, under the impact of scientific and technical revolution a "hot zone" because of the global environmental situation seriously affected by the consequences of

industrialization and automation, the irrational exploitation of natural resources and other factors(Neagu, M. M., 2007).

Thus, as M. Prieur states, the notion of “environment” is a chameleonic notion, which captures many aspects in various definitions given by different domains which cover and operate with this notion(Prieur, M., 1991).

In Romanian law, the notion of environment has been defined by the 137/1995 Law, modified through the Emergency Ordinance of the Government no. 91/2000 and approved through the 294/2003 Law. It explicitly states now that “environment is the ensemble of natural terrestrial conditions and elements, air, water, ground, underground, specific elements of the landscape, all atmospheric layers, all organic and inorganic matter, as well as living beings, natural systems that interact – comprised of all the elements shown before, including material and spiritual values, quality of life and the conditions that may influence health and wellbeing of the human kind”.

Prejudice, as an essential element of tort liability, defines as the result, the negative effect brought by a certain individual, as a direct follow up of an illicit deed of another individual, or as a follow up of the “deed” of an animal or thing, for which is held responsible a certain individual (Stătescu, C., C. Barsan, 2008).

Base provisions for the civil liability in environmental law is O.U.G. 195/2005 regarding environment protection, which modifies and updates Law 137/1995, which doesn’t actually explain the term of “environmental prejudice”, fact that fueled doctrine debates on this matter.

Given the need to harmonize national legislation with Community legislation and to transpose the Directive no. 2004/35/EC on environmental liability relating to the prevention and remedying of environmental damage was adopted Emergency Ordinance Government. 68/2007 approved by Law nr.19/2008 on environmental liability with regard to the prevention and remedying of environmental damage, which established the legal framework for polluter liability for damage caused and also the measures to be taken by any person who has been contaminated. Damage is defined in the same ordinance as "a measurable adverse change in a natural resource or measurable impairment of a natural resource service which may arise directly or indirectly."

According to art. 2 of Ordinance nr.195/2005, as amended, pollution is represented as the direct or indirect pollution of a pollutant(any substance, prepared as a solid, liquid, gas or vapor or energy, electromagnetic radiation, ionizing, thermal, acoustic or vibrations that, introduced into the environment, change the balance of its components and harm living

organisms and material goods) that can harm human health and / or the environment, damage property or cause material damage or inconvenience to use environment for recreation or other legitimate purposes.

Ecological damage exceeds the limits of a detriment to property and individual persons. Environment, as victim, is considered independent of a property right and of a personal right and he must undergo a specific protection(Uliescu, M., 1993).

Based on environmental features, environmental damage has been considered in doctrine to be the detrimental harm to all aspects of a system and, because of its indirect and diffuse character, does not allow the formation of a right to repair (Prieur, M., 1991).

Environmental prejudice goes beyond the usual prejudice of goods or individuals. Environment – as a victim, is considered independent from the right to propriety and from individuals, itself having to be the subject of a specific type of protection(Teodoroiu , S. M., 2003).

The concept of environmental prejudice has been used for the first time by Michel Despax to underline the particularity of indirect prejudice resulting from the damage caused to the environment. Thus, any damage done to an element of the environment (as, for example, the water of the atmosphere) cannot not have effects on the other components of the environment (flora and fauna, aquatic or terrestrial, soil etc.), considering the interdependency of the environmental phenomenon. Thus, environment prejudice represents the harm brought to the ensemble of the elements of a system, and through its indirect and diffuse character creates complex issues regarding the right to repair(Despax, M., 1980).

In the sense of the above, in order to characterize such a prejudice, beginning with the global conservation strategy, we have the following as an acceptable definition: maintaining essential ecological processes, maintaining genetic diversity and maintaining a durable exploitation of species and ecosystems; harm brought to those objectives would constitute “pure ecological prejudice”(Dutu, M, M. Marinescu, 1996, Duțu, M., 2003, Duțu, M., 2007, Duțu, M., 2008).

In terms of the Romanian laws regarding environment protection, to reach legal acknowledgment of the ecological prejudice one must begin with the definition of environment, which is taken into consideration when prejudice is determined and must continue on with the definition by appealing the legal determination of environment deterioration, to comprise also the elements and components of the latter, diversity and productivity of natural ecosystems, ecological equilibrium. So, one might take into indirect consideration a “pure ecological prejudice” (Duțu, M., 2010).

One of the definitions largely accepted by doctrine, states that ecological prejudice is that prejudice which harms the ensemble of the elements of a system and which due to its indirect and diffuse character does not allow the creation of a repair privilege (Dutu, M, M. Marinescu, 1996).

Civil liability specific to legal reports that have a purpose in the protection of environmental factors, appears more as a repair and less as a liability in the classic sense, the liability being implied even when the activity of the polluter is in compliance with administrative legal terms, in the conditions that administrative authorizations are given under the reserve of the third parties' rights (Duțu, M., 2003,).

Depending on how the damage occurs, environmental damages are classified as direct damages and indirect damages. In the first category are included environmental damages itself, independent of direct damage to a human interest, which were qualified in legal literature as pure environmental damage (Pătrău, M., 2005). In the second group are included human damages and property damages. Such damage occur primarily on the natural or artificial environment and have an indirect effect on human, goods, property, which is why they were called indirect damage (Anghel, D., 2010).

The necessity to separate the types of prejudice, creating thus a special type of prejudice out of ecological prejudice or environmental harm, appears as a follow up of the dissatisfaction of the classic repair system, founded on the principle that a prejudice caused to a victim, gives birth to a right to repair only if the prejudice is cert and the victim is a legal subject.

Due to the risks that human activities represent for the environment, the law instituted an objective liability for the prejudice caused, regardless of the author's fault. The victim will only have to prove the existence of the prejudice and the causality report between the fact and the damage. The victim will not have to prove the author's fault that is very difficult to be proved. The final result will be the one that matters, the protection and quality of the environment and not the efforts that a person made to avoid the pollution of the environment. In case of ecologic prejudice, the persons that caused the prejudice are all liable, so that the victim can ask any of the authors to repair the whole damage and the person who pays will ask the others to pay for their damages, because, between the authors, the liability is divided (Marica, A., 2008).

One of the conditions that environmental prejudice must fulfill is its cert character. It has been so considered that a cert determination of the prejudice, may regard its actuality and reality, which consists in the destruction of a rare species of the fauna or flora, massive chronic or accidental pollution of the seas, lakes or watercourses, contribution to

constant destruction of fishes, birds etc. Another aspect of the assessment of the reality of the prejudice might also state the problem of a future prejudice, or by the loss of the source. Determination of a future prejudice in this field of action might find an obstacle in the level of actual scientific knowledge, which might be lacunar or insufficient, or the possibility of future random circumstances (Dutu, M., M. Marinescu, 1996).

The relation between civil responsibility and the principle '*polluter pays*' is emphasized by two distinctions, opposing for one chronic and accidental pollution, and for the other potential and real pollution. Hypothetically, potential polluters are more numerous than real ones. Consequently, the reasoning determining civil responsibility in the matter of ecological damage interferes but not overlaps completely the objective '*polluter pays*' (Mocanu, L., 2009).

The adhesion of Romania on January 1st, 2007 imposed the transposition of Directive 2004/35/CEE on the environmental responsibility regarding the prevention and repair of damages caused to the environment, which aimed at establishing a common framework for the environmental responsibility. The transposition of communitarian regulations was made by means of the Government Urgent Ordinance no. 68/2007 regarding the environmental responsibility which refers to the prevention and repair of the damage caused to the environment. [Du□u, M., 2007].

The doctrine interpreted that mainly, the responsibility regime for the ecological damage instituted by the G.O. no. 68/2007 has the following characteristics: A special responsibility regime is instituted, with a public character, responsibility which is mainly administrative, 'of environmental law', distinct and different from the classical civil responsibility and from the administrative responsibility itself. The environmental responsibility represents rather a reparation (by supporting the cost of the preventive and reparatory measures) than a responsibility in the classical meaning of civil law, character expressed by the rules afferent to its specific regime: objective responsibility (by the actions stipulated in annex no. 3) passive solidarity among operators, in certain conditions and financial warranties (Mocanu, L., 2009).

MATERIALS AND METHODS

In the analysis of the problems treated, of which object is ecological damages, as an essential condition of civil liability in the case of a breach of the legal reports regarding life and environment protection, there were used specific methods of judicial sciences: logic method, comparative method and sociologic method.

Using the logical method, we tried to analyze international and comparative law to draw logical conclusions arising from the interpretation of legal texts incidents and also to make a critical appreciation of the doctrinal opinions conveyed in this area. Regarding the comparative method, the operation that follows the finding of identical or divergent elements of two or more systems of law, by analyzing features and legal institutions and rules governing them, this proved fruitful in studying the methodological legal phenomenon.

So we tried to use the specified methods in their complementarity in order to achieve a useful result, which is to draw a conclusion about the vision of the national and comparative doctrine and legislation that could be a pertinent approach to the notion of environmental damage.

RESULTS AND DISCUSSIONS

Analyzing the issues rose by the “ecological damage” notion, we concluded that giving a definition to the above mentioned notion would be a very difficult task, as it brings up very complex issues. Various laws, domestic and international have tried to define this notion, but without giving a proper complex definition.

National law, otherwise neglects entirely the possibility of a non-pecuniary damage which may be granted by the injured party that the perspective of the act producing the injury, although there are countries that recognize the existence of such damage and force repair through compensations of money.

The need to separate the categories of damages that form from the ecologically pure form of damage or environmental damage occurs as a separate category because of dissatisfaction caused by the classic damage repair system, which is founded on the principle that the victim which suffered the injury has the right to compensation only if the prejudice is certain and the victim is subject of the law.

Table 1

Comparative table of prejudice, as an element of common civil liability and as an element of civil liability incidental to environment law reports:

Ordinary Prejudice	Environmental Prejudice
<ul style="list-style-type: none"> - Leads to an immediate civil liability, the originator of the illicit deed being coerced to repair the prejudice based on a Court Decision. - Prejudice may be often repaired by re-establishing the previous state (restitutio in integrum); if the previous state cannot be established, the originator of the illegal deed will be coerced to civil repairs (material compensations); prejudice repair, in this case, takes the form of monetary liability. 	<ul style="list-style-type: none"> - Implies a belated liability, due to the specificity of the prejudice brought to the environment; - Ecological harm is often definitive; environment deterioration has a different character and is irreversible, and costs of the repair, although very high, cannot always effectively repair the harm done.

We also see viable dividing the category of environmental damage or ecological harm in two subcategories, depending on the victim that is harmed, as to civil damages, in which case the naming refers to a civil liability found in the common law, when the victim is the individual, and an objective liability, and a prejudice of the environment, naming referring to the environment, as the victim of pollution and implicitly to the ecological prejudice.

According to this classification, we believe that a better way to repair the prejudice is at hand, starting with the answer to the question what kind of responsibility should be employed in each case. We believe that civil liability is satisfying the requests to repair an ecologic prejudice caused to individuals, even if there are present elements specific to common law objective liability, yet the structure remains the classic. Concerning liability for environmental damage caused directly to the environment, as there are far more numerous elements of specificity, which to some extent, remove liability in this area of common law civil liability, we believe that it is necessary to recognize a special responsibility, of environmental law.

Another option proposed by the doctrine (Lupan, E., 1996, Lupan, E., et.al., 1997, Lupan, E., 2002, Lupan, E., 2009) is that, in connection with environmental damage caused by pollution, to drop the idea of liability and to adopt the idea of legal obligation of compensation, to be able to sanction, without impediments as proof of guilt and the individual who's illicit acts would produce a prejudice to the environment. It is, thus, removed from this area the idea of illicit act and that of guilt in direct connection with the caused prejudice, forcing the individual that without guilt, but through and illicit act, causes an environmental prejudice, only the duty to repair the produced prejudice. It is a relevant point of view that may answer some of the issues doctrine and judicial practice are facing in what regards repairs for ecological prejudice.

CONCLUSIONS

We've presented earlier in the above paper, the theoretical debate, with practical implications, regarding the nature of environmental law specific civil liability, as doctrine underlined a few options: thus, some opinions considered that there is no need for an extreme separation, as creating a new form of civil liability, environmental liability, different from the classic civil liability, as the specificity elements do not modify at an essential level the classic liability and thus the dichotomy is not justified. We consider that the term used, "special liability" is not synonymous to the autonomous liability, the latter implying exactly the separation mentioned above, a totally new category, self implied, as the term "special liability" induces the idea that base and conditions of classic liability would be kept and we would add conditions specific to the environmental legislation.

Therefore, civil liability remains a unique institution, but not an unitary one, allowing the different legal branches to develop specific demands to specific domains, which case creates a specific type of liability, as the environmental legal provisions. Liability regarding environmental laws would thus be comprised of two parts: a specific liability, which would become incidental in the situation of an ecological prejudice provoked by a breach of the specific provisions of this domain – a precautionary principle and a prevention principle – implying thus liability for not complying to the provisions of environment protection and a classic civil liability, incidental to the principle "the polluter pays", which respects the classic schematic: originator of the illicit deed (polluter) – causality report – prejudice – victim of pollution.

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