

# The Constitutional Reflection of the Right to a Healthy and Ecologically Balanced Environment

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**ABSTRACT:** Nowadays, people have become increasingly concerned about topics such as: the environment, climate, ecology, climate change. Human coexistence on our beautiful blue planet currently involves, more than ever, the development of a legal conscience. In this background, this study proposes a generous objective, namely to know the general legal framework regarding the regulation in Romanian legislation of the right to a healthy and ecologically balanced environment. From this perspective, we believe that the theme is highly topical and important for several categories of subjects: private individuals, public authorities, but also for states, to a large extent. The proposed architecture of the paperwork consists of several parts, organized in a logical sequence. Part I provides a brief introduction to the general subject of the topic. Part II analyzes the legislative framework in order to know how the constituent legislator regulated the right to a healthy environment. Part III focuses on discussing the contribution of case-law in shaping the state's obligation to provide the legal framework for the exercise of the right to a healthy and ecologically balanced environment.

**KEYWORDS:** Constitution, public authorities, the right to a healthy and ecologically balanced environment, the Constitutional Court of Romania, state

## Introduction

The analysis of the proposed topic is based on the idea that scientific research must be carried out from a threefold perspective, i.e., knowledge of the legislation, of the position of the doctrine on the topic under analysis and of judicial practice. According to professor M. Duțu: "following developments in recognizing and securing its meaning in constitutions, domestic law, EU law and international law, the right to the environment has experienced important developments" (Duțu 2021, 248). Therefore, the paperwork is focused on the practical component, namely on the identification of cases that highlight the state's obligations in relation to the environment.

As noted in the doctrine, "although the European Convention on Human Rights does not have an express text guaranteeing the right to a healthy environment, its case-law has provided important rulings with an impact on international environmental law" (Hanciu 2021, 79). From this perspective, the research methodology of this paperwork presents the views of judges of the Constitutional Court or even of the European Court of Human Rights, in relation to environmental issues, in actual cases. In our view, "it is incumbent on the Constitutional Court of Romania to establish, through its case-law, by binding decisions, the manner of interpretation of constitutional texts" (Ștefan 2017, 83).

As far as the environment is concerned, we believe that today we should be concerned not so much with looking for those responsible for its destruction as with finding solutions to respect and preserve it. In our opinion, shifting the focus of the problem from liability to responsibility could be a possible solution to environmental protection. Therefore, it seems more appropriate not only to ask rhetorically: "*Who is to blame for environmental destruction?*" when we can ask: "What can we do ourselves to stop environmental destruction?" According to the doctrine, "from the historical point of view, states have been concerned to incorporate the issue of human responsibility in their constitutions and common acts under different terminologies" (Ștefan 2013, 12).

By using methods specific to law, the paperwork will underline the conclusion that the issue of legal regulation of environmental protection is becoming increasingly complex,

including not only legal liability but also responsibility, in consideration of the protection of present and future generations.

### **National constitutional and legal reference points of the right to a healthy environment**

The Constitution of Romania regulates the right to a healthy environment in art. 35 and the legislator has regulated rights and duties with regard to the environment. According to art. 35 para. (1): “*The State shall acknowledge the right of every person to a healthy, well preserved and balanced environment*”. According to art. 35 para. (2): “*The State shall provide the legislative framework for the exercise of such right*” while, para. (3) provides: “*Natural and legal entities shall be bound to protect and improve the environment*”. According to the common language, in a general sense, *to protect* means: “to defend” and *to improve* means: “to enhance”. From this perspective, we appreciate that, in fulfilling the constitutional duty, natural and legal persons can express themselves both through actions and inactions, i.e., by refraining from destroying the environment, similar to the ethical principle “do no harm”.

In the same vein, we consider useful in our approach the legal interpretation of the coordinates to a health and ecologically balanced environment and the conjunction with art. 57 of the Constitution – *the exercise of the rights and freedoms*. We mention that art. 57 of the Constitution is placed in Title II – *Fundamental rights, freedoms and duties*, Chapter III – *Fundamental duties* and shall read as follows: “*Romanian citizens, foreign citizens, and stateless persons shall exercise their constitutional rights and freedoms in good faith, without any infringement of the rights and freedoms of others*”. By analyzing the text, we note that the exercise of the rights and freedoms, being a compulsory norm, it requires compliance with two conditions: good faith and non-infringement of the rights and freedoms of others.

In case of the legal regulation, everyone observes it, as it is a non-negotiable legal obligation. The norm is compulsory, being even a constitutional obligation deriving from art. 1 para. (5) of the Constitution: “*In Romania, the observance of the Constitution, its supremacy and the laws shall be mandatory*”. Furthermore, we agree with the opinion of professor C. Rarincescu “the binding nature of the legal rule undoubtedly derives from the general legal conscience” (Rarincescu 1936, 9).

In what concerns the environment, we consider the dimension of responsibility to be complex as it concerns not only the present but also future generations. Therefore, we believe that personal example of responsibility can be the right attitude in protecting the environment in general. From another perspective, national law even defines a term, namely “imminent damage”. Law no. 554/2004 of the contentious administrative (published in Official Journal no. 1154 of 7 December 2004) defines in art. 2 para. (1) letter ș) *imminent damage*: “foreseeable and future material damage or, where appropriate, serious disturbance in the functioning of a public authority or a public service”. Therefore, in our opinion, the right to a healthy environment cannot be conceived in the absence of the responsibility and the duty to protect it, to avoid causing damage, precisely for the sake of present and GEO no. 195/2005 on the environmental protection (published in Official Journal no. 1196 of 30 December 2005). According to art. 5 of this normative act: “the state recognizes the right of every individual to a healthy and ecologically balanced environment, guaranteeing to this end:

- a.) access to environmental information, subject to the conditions of confidentiality laid down by law;
- b.) the right of association in environmental organizations;
- c.) the right to be consulted in decision-making process on the development of environmental policy and legislation, the issuing of related regulatory acts, the preparation of plans and programmes;

d.) the right to resort directly or through environmental organizations to administrative and/or judicial authorities, as appropriate, in environmental matters, whether or not damage has occurred;

e.) the right to compensation for damage suffered”.

Furthermore, we also add that, according to the provisions of art. 6 para. (1) of GEO no. 195/2005: “*environmental protection is the obligation and responsibility of central and local public authorities and all natural and legal persons*”. A quote from Professor N. Popa is appropriate in this context: “human coexistence increasingly feels the need for security, clarity and order in its inner relationships” (Popa 2008, 63).

### **Case-law on the right to a healthy environment**

In this section, the research methodology included a selection of case studies from the case-law of the Constitutional Court of Romania and the European Court of Human Rights, in order to investigate the contribution of national and European judicial practice on the rights and obligations of the state in relation to the environment.

On the one hand, the Constitutional Court of Romania, in its case-law, has ruled on the legal interpretation of the right to a healthy environment regulated by the Constitution and we will analyze two decisions from 2014 and 2022. On the other side, the study will also refer to the judgments of the European Court of Human Rights in case *Tătar v. Romania* and *Băcilă v. Romania*. In one case, the Constitutional Court of Romania held that “As regards the right to a healthy environment, the state has both negative and positive obligations. As far as the positive obligations of the state are concerned, these involve the creation of a legislative and administrative framework aimed at the effective prevention of damage to the environment and human health (Judgment of the European Court of Human Rights of 7 January 2009 in case *Tătar c. României*, para. 88). Therefore, the measures in question must be aimed at preventing environmental degradation, establishing the necessary remedies and regulating the sustainable use of natural resources” (Decision no. 80/2014 of the Constitutional Court of Romania, published in Official Journal no. 246 of 7 April 2014, para. 401).

Therefore, the Constitutional Court held in another case: “human dignity, from a constitutional point of view, entails two inherent dimensions, namely the relations between people, which concern people's right and obligation to observe them and, in that connection, to respect the fundamental rights and freedoms of their fellow human beings, as well as individual's relationship with the environment” (Decision no. 1/2012 of the Constitutional Court of Romania published in Official Journal no. 53 of 3 January 2012).

As regards the analysis of the right to a healthy environment, the Constitutional Court has recently developed, under several coordinates, the obligations of the state. Therefore, the Court holds that: “as regards the right to a healthy environment, the provisions of art. 35 of the Fundamental Law establish the positive obligation of the state to provide the legislative framework for the exercise of the right to a healthy and ecologically balanced environment, and the duty of natural and legal persons to protect and improve the environment” (Decision no. 295/2022 of the Constitutional Court of Romania, published in Official Journal no. 568 of 10 June 2022, para. 173). In substantiation of decision no. 295/2022, the Court also held: “Furthermore, given the market economy, the provisions of art. 135 para. (2) letter e) and f) of the Constitution establishes the obligation of the state to ensure the restoration and protection of the environment and the maintenance of the ecological balance, by creating the necessary conditions for improving the quality of life” (Idem). In the opinion of the Court: “The right to a healthy environment means taking all necessary measures to ensure a better quality of the environment, and preserving a healthy environment means in fact preserving and improving the quality of life in order to maintain the ecological balance” (Idem). In conclusion, the Court held that: “In order to fulfill the obligation of protection, the state must adopt sufficient

regulatory measures to ensure the effective exercise of the right to a healthy environment of every person” (Idem, para. 174).

The following are two other cases, but this time from the case-law of the European Court of Human Rights, concerning the passivity of public authorities in relation to the environment, both against Romania.

In first case, *Băcilă v. Romania*, the plaintiff filed a petition before the Court on 27 January 2004 complaining that the environmental pollution generated by company *S.* was seriously affecting her health and the environment. The plaintiff complained about the passivity of the local authorities of Copșa Mică in taking measures to remedy the situation. The respective plant was the main employer in the area and the main producer of lead and zinc (Judgment of the European Court of Human Rights in case *Băcilă v. Romania*, pronounced on 30 March 2010).

The Court held the following in case *Băcilă v. Romania*: “In the course of the proceedings, the plaintiff submitted medical documents attesting the impact and causal link between the pollution and the deterioration of her health, in particular lead and sulphur dioxide poisoning.” (para. 63). The Court decided the following on 30 March 2010: “despite the margin of discretion granted to the defendant state, it failed to maintain a fair balance between the interests of the economic well-being of the town of Copșa Mică - that of maintaining the activity of the main employer in the town - and the applicant's effective right to respect for her home and her private and family life” (para. 72). The Court held the following: “this interest cannot prevail over the right of the persons concerned to benefit from a balanced environment which does not affect their health. The existence of serious and proven consequences for the health of the plaintiff and the other inhabitants of Copșa Mică imposed a positive obligation on the State to adopt and implement reasonable and appropriate measures capable of protecting their well-being” (para. 71) (Judgment of the European Court of Human Rights in case *Băcilă v. Romania*, pronounced on 30 March 2010).

In the second case, *Tătar v. Romania*, the two plaintiffs, father and son filed petition before the Court on 17 July 2000 and complained that the technological process used by company *A.* was a danger to their lives. Furthermore, the plaintiffs complained about the passivity of the authorities in this situation (Judgment of the European Court of Human Rights in case *Tătar v. Romania*, pronounced on 27 January 2009).

In brief, de facto situation was as follows: “On 30 January 2000 an ecological accident occurred, i.e., a large quantity of polluted water (estimated at almost 100,000 cubic metres) containing, among other things, sodium cyanide was discharged into Săsar river, then into Lăpuș and Someș rivers. Polluted water in Someș river was discharged in Tisa River (...), crossed the border between Romania and Hungary, (...) crossed the border between Romania and Serbia and Montenegro and re-entered the territory of Romania and subsequently discharged into the Danube. In 14 days, the polluted water travelled 800 km, and finally it was discharged into the Black Sea through the Danube Delta.” (para. 25).

On the health and environmental consequences of the environmental accident of January 2000, the Court: “holds that the population of Baia Mare, to which the plaintiffs belong, has had to live in a state of anguish and uncertainty accentuated by the passivity of the national authorities, which were under the obligation to provide sufficient and detailed information on the past, present and future consequences of the environmental accident on their health and on the environment” (para. 122). The Court “after examining the evidence on file, is convinced that the national authorities have not fulfilled their obligation to inform the population of Baia Mare and the plaintiffs. The latter are not in a position to know what measures could be taken to prevent a similar accident or what measures should be taken in the event of a repetition of such an accident” (para. 124). Therefore, “the Court finds that the defendant State has failed to fulfil its obligation to guarantee the applicants' right to respect for their private and family life within the meaning of Article 8 of the Convention” (para.

125) (Judgment of the European Court of Human Rights in case *Tătar v. Romania*, pronounced on 27 January 2009).

## Conclusions

This analysis illustrated how the Romanian legislator regulated the right to a healthy and ecologically balanced environment. After documenting the topic, it was noted that it is constitutionally and legally enshrined. Therefore, article 35 of the Constitution of Romania regulates the right to a healthy and ecologically balanced environment, the legal framework being supplemented by Government Emergency Ordinance no. 195/2005 on environmental protection. Moreover, as noted in the doctrine, "law has been and continues to be subject to the tensions between the general and the particular, the singular and the universal, the equal and the unequal, the old and the new, the stable and the changing" (Lazăr 2004, 9).

On the other hand, our research also considered how the legal regulation is implemented in practice. Therefore, we have used the case-law of the Constitutional Court and the selection of the case studies was based on the judges' views on the analysis of Article 35 of the Constitution. Furthermore, we have also considered necessary to discuss two cases decided by the European Court of Human Rights which had in common the fact that they were both brought against the Romanian State because it did not fulfil certain obligations and both were decided in favor of the defendants.

The final conclusion that emerges from our paperwork is that there is a legal and constitutional obligation of the state to ensure the legal framework for the exercise of the right to a healthy and ecologically balanced environment.

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