

The Impact of Environmental Protection Law Basic Principles on the Establishment of Environmental Liability

انعكاس المبادئ الأساسية في قانون حماية البيئة على تأسيس المسؤولية البيئية

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Abstract :

Recently, scholars and various legislations- globally and regionally- have paid great attention to the notion of environmental liability due to the repercussions of environmental pollution, climate change and global warming on the life of individuals. The Algerian legislator, who is not a stranger to such a domain, dealt with such a matter back in 1983 under Law No. 83/03; annulled under Law No. 03/10, on the Environment within the Framework of Sustainable Development. The latter introduced a set of principles that do not differ from their counterparts in European law, the United Nations Environment Programme, and the Rio Convention. However, the practical aspect and application of the law in Algerian legislation remain unclear, leaving the question of the basis of environmental liability unanswered.

Keywords : Environment; liability; protection; polluter pays

ملخص:

حظي موضوع المسؤولية البيئية في السنوات الأخيرة باهتمام كبير من قبل الدارسين و مختلف التشريعات على المستوى الدولي و الداخلي، نظرا لانعكاسات التلوث البيئي و تغيرات المناخ و الاحتباس الحراري على حياة الفرد، و من بينها المشرع الجزائري الذي عالج الموضوع في 1983 بموجب القانون 03/83 ، الذي تم الغاؤه بموجب القانون 10/03 المتعلق بالبيئة في اطار التنمية المستدامة ، و جاء هذا الأخير بجملة من المبادئ لا تختلف عن نظيراتها في القانون الأوروبي و برنامج الأمم المتحدة للبيئة واتفاقية ريو، إلا أنّ الجانب العملي وتطبيق القانون في التشريع الجزائري لا يخلو من الغموض، فأى أساس تقوم عليها المسؤولية البيئية.

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Introduction

Because of the current environmental catastrophe, protecting the environment is one of the most urgent problems that needs to be solved. This is extremely important because of the danger that both living and non-living things face, especially because environmental degradation is so special. A thorough environmental law system is essential to preserving our human legacy, especially in view of the new and unidentified risks to this vital ecosystem.

Environmental law is founded on crucial legal principles derived from international treaty law, international customary law, and national laws governing this field. Since the 1972 Stockholm Convention, the 1985 European Covenant, and the 1992 Rio Declaration, United Nations recommendations for environmental protection and reports on specific environmental issues have emerged. The 1995 French Barnier Law¹ introduced a set of environmental protection principles, and the 10/2003 Law on Environmental Protection in the Context of Sustainable Development reiterated the fundamental principles of environmental law, as stipulated in Article 3 thereof.

In its broadest sense, the term "environment"² refers to "the sum of the natural, social, and cultural conditions that reflect the life of an individual or a group of individuals, and thus encompasses all the phenomena that surround us, such as traffic congestion, crime, and chaos, are fall within the context of environmental problems"³. In this context, we recall Kant's concept of "cosmopolitical" law, where environmental law expresses shared principles among peoples, based on global solidarity to confront various environmental challenges. As stipulated in the 1992 Rio Declaration held in Brazil, "The Earth is the only home for humanity."⁴

The United Nations Conference held in Stockholm, Sweden, in 1972 defined the environment as "the sum total of all the physical and social resources available at any given time and place to meet human needs and aspirations."

The Algerian legislator, in Article 04 of Law 03/10 concerning the environment within the framework of sustainable development, defined the environment as "the sum of non-living and living natural resources such as air, atmosphere, water, land, plants, and animals, including genetic heritage and the interactions between these elements, as well as places, landscapes, and natural landmarks."

Environmental law refers to the totality of legal rules, including treaties, systems, laws, and customs, that address the impacts of human behavior on the environment. Environmental liability is the legal means through which the affected party seeks compensation for environmental damage caused by the polluter.

The Environmental Law for Sustainable Development 03/10 introduced fundamental preventive and remedial principles, articulated in Article 03 with eight (08) principles, including biodiversity conservation, integration principle, information and participation principle, preventive action principle, precautionary principle, and polluter pays principle. However, the last three principals have received significant attention and study as they hold polluters responsible for the damages caused by their activities negatively affecting the environment. These legal principles

encompass preventive and deterrent measures prescribed by law, which competent authorities are responsible for implementing and ensuring compliance through various mechanisms.⁵

Environmental liability is defined as "the commitment of business organizations to public health and safety while conducting their activities and responding to environmental issues by balancing the pursuit of profit with protecting the natural environment from any harm resulting from these activities."⁶

The problem we aim to address and answer through this research paper is: What is the role of the fundamental principles adopted by the legislator in the Environmental Protection Law for Sustainable Development 03/10 as the basis for establishing liability for environmental pollution? Are they effective enough to determine compensation for environmental damage?

To answer this problem, we delve into the key principles adopted by the legislator in the Environmental Protection Law, which could establish environmental liability in two sections:

1. Preventive principles and how liability can be based on them.
2. Remedial principles and establishing liability accordingly.

1- Establishing Environmental Liability Based on Preventive Principles

In recent years, the public's awareness of the value of the environment and the need to preserve the natural surroundings has grown, leading lawmakers to pass laws that reflect these new understandings. Uncontrolled use of natural resources and the extensive spread of different pollutants in the environment beyond the ability of nature to repair itself are the main causes of environmental issues. As a result, care must be taken to stop damage before it starts.

1-1 Principle of Precaution and Prevention

The term "**precaution**" is frequently used in environmental, public health⁷, and consumer protection topics⁸. From a philosophical perspective, its roots trace back to Aristotle, while others consider it a political principle. Additionally, it is viewed as an ethical principle found in international law texts. Defining the legal concept of precaution is challenging, as its presentation to citizens indicates guidance for economic operators and serves as a **flexible guideline subject to judicial discretion**.

However, upon reading Article 03 of the Environmental Law for Sustainable Development 03/10, it is noted that the legislator recognized the precautionary principle as a legal principle, as it carries an obligatory nature with the phrase "shall be required," indicating that the rule is mandatory for application⁹ by activities that pose serious risks to the environment.

The origin of this principle in international law can be traced back to decisions made between countries concerning the protection of the North Sea in the 1970s, initiated by Germany¹⁰. It was further emphasized during the second conference organized in London on November 24-25, 1987, highlighting the necessity of precaution in regulating hazardous substances, leading to the London Declaration. Subsequently, this principle was endorsed by the Paris Commission

established under the 1974 Convention on Marine Pollution and in the Montreal Protocol for the Protection of the Ozone Layer in 1987.

The precautionary principle expanded and was adopted in environmental law as a general political principle in the United Nations Program meetings on May 25, 1989, and in Addis Ababa in 1990. It emerged clearly in the Rio de Janeiro Convention in 1992¹¹, notably in Principle 15 of the convention¹², which stipulates that "in case of threat of significant damage that is not fully scientifically ascertainable, lack of scientific certainty shall not be used as a reason for postponing measures to prevent environmental degradation."¹³

There is no uniform definition of this principle; most laws provide a broad definition or merely reference it without defining it. Professors Kourilsky and Viney defined the precautionary principle in their report to the French Prime Minister as follows: "The precautionary principle is the behavior that must be followed by anyone making a decision regarding an activity assumed to pose a significant risk to health, biological diversity, or the environment, currently or in the future."¹⁴

Meanwhile, Algerian legislation defined it in paragraph 7 of Article 3 of Law 03/10 related to environmental protection within the framework of sustainable development as: "The precautionary principle, under which, in view of current scientific and technological knowledge, the absence of available technologies should not be a reason to delay the adoption of effective and proportionate measures to prevent the risk of serious environmental damage, at an economically acceptable cost."¹⁵

It is noteworthy from the definition that it encompasses the concept of fault, which is "intentional or unintentional action causing unjustified harm to others, resulting in liability for compensation. The cause of unjustified damage itself is the fault."¹⁶ Negligence is also a form of fault, where a person commits an act without intending harm to others but is aware of the act's consequences and the resulting harm to others due to lack of caution.¹⁷

The proper application of this principle requires **defining the concept of risk under this law** and understanding what the legislator meant by "serious damage" to effectively apply this principle as a basis for environmental liability. The law did not specify the content of proportionality between serious environmental damage and preventive measures, except by stipulating "economically acceptable cost" and "appropriate measures relative to the extent of the damage," making the standard flexible.

In jurisprudence, it is understood that it refers to the absence of complete scientific knowledge, concerning all or some aspects related to potential environmental risks or the risk associated with a product or service, where the risk remains possible and unpredictable by experts, thus remaining a potential hazard.¹⁸

If the precautionary principle is associated with avoiding potential and unknown hazards, **the preventive principal** addresses known and established risks and how to avoid them.¹⁹ The **principle of prevention** involves the use of measures and applications or means that allow for the reduction of pollution, including recycling, waste treatment, enhancing control mechanisms, and the prudent use of natural resources, which can have positive impacts on the environment.

Prevention is an action taken before known harm occurs, as stipulated by the legislator in Article 03 of Law 03/10, paragraph 05: "The preventive principle and environmental damage correction should take precedence at the source, using the best available technologies at an acceptable economic cost. Every person capable of causing significant environmental damage must consider the interests of others before taking action."

Based on this, a part of jurisprudence argues that responsibility based on the precautionary principle is not a legal responsibility in the conventional sense but rather represents new ethics of responsibility. It differs in its foundation from traditional responsibility based on causality, focusing not on errors committed toward the environment but on what can always be done within reasonable limits.²⁰ Does this make sense?

1-1-1 The Precautionary Principle as a Basis for Environmental Liability

The precautionary principle contributes to assessing and evaluating behavior in civil liability law, whereby it can establish individual civil liability if there is an uncertain risk of harm that was not adequately addressed to avoid it. The French Court of Cassation acknowledged that the precautionary principle encompasses a new basis for punishable behavior under Article 1382 of the French Civil Code,²¹ corresponding to Article 124 of the Criminal Code.²²

The Supreme Court issued a clear ruling²³ on the direct attribution of liability to the responsible party for economic activities based on a **lack of precaution**, dated December 2, 1992. The summary of the case reveals that the Court of Justice in Tlemcen held the victim responsible because he committed an error by allowing his livestock to drink contaminated water unsuitable for drinking. Consequently, he failed in his duty of care and was deemed responsible for the harm caused to the livestock, based on Articles 138 and 139 of the French Civil Code. However, the Supreme Court overturned this decision, ruling in favor of compensating the victim and holding the mine owner responsible. In this regard, the Court of Justice in Tlemcen erroneously cited liability based on Article 138 because the guardian's responsibility is strict liability that exists without the need to prove fault.

Therefore, in the absence of a contractual breach, the error is one of omission attributed to lack of foresight, which scholars attribute to oversight. This concept of oversight can be understood in two forms: the first involves specific, clearly defined legal obligations imposed by laws or workplace rules that dictate the behavior individuals must follow, such as respecting traffic signals. Violating or deviating from these legal rules constitutes an error for which the individual is accountable. The second form of error includes obligations not confined to specific legal rules due to their variability in different situations, identified through various standards like habitual conduct, lack of precaution, or negligence.²⁴

The definition of environmental error encompasses violations of laws and regulations concerning environmental protection or non-compliance with legally imposed obligations. This concept is applicable when explicit texts specify obligations and precautions, including negligence and failure to adhere to the precautionary principle as stipulated in the Environmental Law for Sustainable Development 03/10.

Talking about liability is impossible without the existence of harm, as the absence of harm prevents civil liability. The scholar Combacau stipulated that "there is no existence or imposition of liability without proving the occurrence of harm." This is because harm is an inherent factor attached to an act or an unlawful activity. The latter is a consequence of the former, as confirmed by Queneudeé, who said, "To determine liability, proof of harm must first be established."²⁵

Considering the characteristics of environmental harm, it is non-personal and relates to things not owned by or unique to a specific individual. Additionally, it is indirect and occurs not only due to the responsible party's activity but also from the interaction of multiple factors. It is also deferred and ongoing, as damage may manifest after a period of time, such as exposure to toxic radiation. Environmental harm is also capable of spreading and does not settle in a specific geographic area. This contributed to the development of the concept of "neighborhood" in international law, which no longer requires regional adherence to prove the harmful effects between stipulates.

Furthermore, environmental harm is difficult to define and challenging to identify its source. This complexity arises from multiple sources contributing to the damage, often requiring the expertise of environmental scientists and technicians.²⁶

Environmental harm is considered irreparable damage because if repair is a legal consequence of civil liability, restoring the situation to its state before the damage occurred may not be possible, especially when ecological systems are affected. In such cases, the affected party may only seek compensation.

Therefore, establishing liability for environmental damage due to negligence requires the affected party to prove the occurrence of the error by the responsible person that resulted in harm from environmental pollution. Negligence is a result of lack of foresight, failure to take necessary precautions, and arbitrary exercise of rights.²⁷

2- Establishing Environmental Liability Based on Remedial Principles

Environmental damage has become certain and evident, often rendering preventive measures and precautions insufficient to avoid the various hazards resulting from increased human activity directly impacting the environment. As these damages have become an undeniable reality, legislation has sought to impose fines on polluters for the damages they cause on one hand, and to rectify the situation on the other hand based on the principle of the polluter pays.

2-1 Polluter-Pays Principle as a Remedial Mechanism

The polluter-pays principle is an economic and legal mechanism recognized by environmental protection legislation. It serves both preventive and remedial purposes, aiming at establishing responsibility and redressing damage.²⁸ The origin of the principle can be traced back to the theory of externalities affecting the environment, whereby these impacts should be accounted for in the cost of production or consumption.²⁹ The principle first emerged in recommendations from the Organisation for Economic Co-operation and Development (OECD)³⁰ and in the Stockholm Declaration.

The theory of newly created risks suggests that anyone who creates a risk to others through their personal activities or use of specific things is obliged to compensate for the resulting damage caused to others when this risk materializes.³¹ This theory has faced criticism as it holds individuals accountable for damage resulting from any activity they engage in.

Proponents of objective theory have attempted to establish environmental liability based on principles of consequential liability or the theory of newly created risks, which is based on the risk-profit theory (risque-profit). The concept of profit here refers to economic gain, thus examining the economic aspect of an individual's polluting activity. This approach is specific and focuses on a particular aspect of the polluter's activity, vividly illustrated by the polluter-pays principle, whereby the actor questions the action in terms of the benefits gained from avoiding certain outcomes.

Article 03 of Law 03/10 concerning environmental protection within the framework of sustainable development stipulates in paragraph 08: "The Polluter-Pays Principle, under which every person whose activity causes or could cause environmental damage shall bear the costs of all pollution prevention, reduction, and restoration measures to return the affected areas and environment to their original state." Legal experts, such as "Serenifaro," affirm that the Polluter-Pays Principle is the most effective means of distributing the costs of pollution prevention and control, including its application to both preventive and remedial measures.³²

This principle involves imposing fees and taxes on those engaged in polluting activities on one hand, and holding polluters responsible for the costs of preventive measures, environmental assessments, compensation, and damage removal on the other.³³

The Polluter-Pays Principle serves several functions: firstly, it redistributes pollution costs to achieve economic integration, aiming for fairness in distributing the burden of economic activities that harm the environment. Secondly, it has a preventive function; imposing fees on polluters aims to reduce pollution. Thirdly, it serves a remedial function by making polluters bear the costs of environmental damages.³⁴

As many legal scholars emphasize, this principle represents a new form of objective liability, presented in a new formulation and shape, which is the most advanced solution for compensating for environmental damage.³⁵ Notable features of objective liability include its object-based nature, requiring the existence of damage, harmful action, and a causal relationship between them, without the need to prove fault on the part of the affected party.

The objective liability is a legal responsibility expressly stipulated and defined by the legislator, as stipulated in Article 138 of the Civil Code, thereby deriving its legal source. Objective liability is considered complementary to fault-based (personal) liability, both of which constitute actions eligible for compensation. Considering its constitutive elements such as environmental components like objects and pollutants, in the absence of specific provisions, Article 138 of the Civil Code is applied, considering it encompasses all inanimate objects.³⁶ This has been confirmed in various decisions, where factory and industrial machine emissions, harmful gases, and polluted water are considered as objects.³⁷

In a previous ruling³⁸ issued by the Supreme Court, it held the mine owner responsible as a custodian and having authority over the premises, deeming them responsible for the polluted water expelled by the mine, not necessarily due to negligence or lack of care. Therefore, the mine owner's liability for the polluted water expelled by the mine is valid, albeit the legal foundation conflicting with the essence of Article 138 of the Civil Code and its content.

2-2-1 Compensation for Environmental Damage

Compensation is considered the primary objective of civil liability, aiming primarily to remedy the damage, either through restitution or by equivalent value.

Restitutionary compensation aims at **restoring the situation to what it was before the damage occurred**, as defined in the White Paper on Environmental Liability issued in 2000, encompassing any action aimed at repairing the damage to establish a state of natural resources similar to their pre-damage state. This aligns with the principles of international environmental law under international agreements like the 1974 Convention on the Prevention of Marine Pollution from Land-Based Sources, obliging parties to remove land-based marine pollution.³⁹

The Algerian legislator has consecrated the principle of repairing environmental damage by restoring the situation to its previous state in several different texts, such as Law 01/19 concerning the management, monitoring, and removal of waste,⁴⁰ as well as in the Coastal Protection and Development Law⁴¹ 02/02. Also, in Article 03, paragraph 07 of the Environmental Protection Law within the framework of sustainable development 03/10, the term "restoring the situation to its previous state" is used without a specific definition. However, the term is defined in the "Lugano Convention"⁴² : "any reasonable means of reconditioning and restoring the damaged environmental components, as well as the means intended to establish a state of equilibrium that is reasonable and achievable with regard to the components of the environment."⁴³ This definition is also mentioned in Article 102/2 of the same law, where it refers to returning to a state close to the previous condition, not necessarily the original state, as that would be very difficult. The purpose is to restore the damaged environment.⁴⁴

The application of this type of remedy can be challenging. For example, if pollution is caused by factories emitting dust and toxic gases, the judge may require the factory owner to install filters, but it is not conceivable that the judge would order the removal of the factory.

The legislator also used the term "replacement," defined as an environmental compensation system, which involves converting assets that are of the same nature and must have a value equivalent to what existed previously, without causing a decrease in quality of life.⁴⁵

What distinguishes environmental compensation from restoration is the subject matter. While restoration to the previous state can lead to unspecified damages, environmental compensation differs in that it involves creating an environment similar to the damaged one while preserving environmental balance.⁴⁶

As for cash compensation, it is awarded by ordering a monetary amount to the victim as a result of the harm suffered, especially when it is not possible to restore the situation to what it was

before the damage occurred.⁴⁷ Compensation does not erase the harm because what happened has already occurred, but it assists in repairing the damage to the extent possible.⁴⁸

Regarding the conditions for compensable harm: the harm must be actual, where its consequences are evident or inevitable. The harm must be substantial, as stipulated in the Stockholm Declaration's sixth principle, and there must also be a direct causal link between the harm and the hazardous activity, where the hazardous act is the cause of the harm.

In terms of assessing the value of compensation, it is based on general principles, estimating the loss suffered by the victim and the gain that was missed. This is stipulated in Article 182 of the Civil Code: "Compensation includes the loss incurred and the profit lost, provided that this is a natural consequence of non-compliance with an obligation or delay in fulfilling it, and the harm is considered a natural consequence if the creditor could not avoid it by reasonable effort."

Referring back to Article 03 of Law 03/10, it can be said that the original obligation of the debtor (polluter) or the person causing the harm is specific performance, hence restoring the situation to what it was before, i.e., repairing the damage ("réparation"). The source of this obligation is the law as the article establishes an imperative rule requiring this: "The polluter-pays principle **whereby...expenses for** pollution prevention and restoration of places and their environment to their original state." However, due to the difficulty of applying this latter requirement, the court may order compensation ("indemnisation") as occurred in the Arica case.⁴⁹

Conclusion

Environmental pollution is deemed to be one of the severest and most complex issues of our time, characterized by its harmful and potentially long-lasting effects that may transcend generations and become increasingly challenging to rectify over time. Additionally, environmental damage can often be indirect, making it difficult to pinpoint the source of the harm.

The purpose of civil liability is to repair damage and address these challenges. After discussing the principles governing environmental law, it becomes evident that its goal is both preventative and remedial. However, in reality, the enforcement of legal provisions remains elusive, as judicial rulings and decisions are what ultimately reinforce the application of these laws. Thus, evaluating the effectiveness of these principles becomes impractical in the absence of practical application, preventing us from making definitive conclusions.

Based on the principles of prevention and the polluter-pays principle, civil liability can be established either on the basis of fault (personal liability) or objectively based on the polluter-pays principle, where the mere existence of harm holds the polluter responsible for their damaging actions. The discretionary power of the judge remains paramount, depending on the circumstances presented, as environmental liability is established with proof of environmental harm, legally binding despite differing foundational principles. The challenge lies in determining the extent and source of the damage, posing the question of whether the legislator will address this deficiency or leave it to the judge's discretion.

Furthermore, the role of administration and regulatory control in enforcing laws and regulations on the ground is crucial, strengthening the adoption of precautionary or deterrent measures to prevent environmental crimes.

As highlighted in Article 36 of Law 03/10, which allows associations to directly initiate lawsuits for environmental damages, it is also essential to clarify the necessary procedures to be followed by all affected parties.

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¹⁷ Ali Filali, "Compensable Faults," Mawafm Publications, Algeria, 2014, p. 84.

¹⁸ Lamiaa Hamdadou, *ibid* reference, p. 60.

¹⁹ The difference between the precautionary principle and the preventive principle: The preventive principle allows for the avoidance or reduction of damages resulting from surrounding risks in the workplace, as stipulated in the Barnier Law of 1995, and the Environmental Treaty of 2005. On the other hand, the precautionary principle seeks caution and prevention of unknown hazards, as outlined in the Rio Declaration of 1992, the Environmental Treaty also in 2005, and the Lisbon Convention in 2007.

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⁴⁷ Mohamed Bouattaf, *op cit*, p. 286.

⁴⁸ Mustapha El Oujdi, *op cit*, p. 224.

⁴⁹ The Erika Case: The Paris Criminal Court was tasked with adjudicating the ecological disaster of December 12, 1999, when the oil tanker carrying 30,000 tons of heavy fuel oil broke in two off the French coastline. This incident caused an oil spill, contaminating 400 kilometers of French coastline and resulting in the deaths of tens of thousands of birds (estimated between 80,000 and 150,000). Fifteen individuals and legal entities were prosecuted for the first time in France for "pollution by hydrocarbons and endangerment of others," including the charterer, owner, and operator of the Erika, the ship's captain, and the classification society. Facing them were 101 civil parties representing environmental associations, municipalities, regions, departments, fishermen, and salt harvesters. After several months of trial, the court issued a landmark judgment, although various parties in the trial decided to appeal the decision.

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