

ROMANIA: A CONSTITUTION WITH ESSENTIAL STANDARDS AND THE DEVELOPING PRACTICE OF THE CONSTITUTIONAL ACTORS



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1. The right to a healthy environment and the protection of future generations in the Constitution of Romania

The Constitution of Romania was adopted in the sitting of the Constituent Assembly of November 21, 1991,¹ and entered into force after its approval by the national referendum of December 8, 1991. In its initial version, it did not include a specific provision concerning the right to a healthy environment. The Constitution provided only for the obligation of the state *“to secure the exploitation of natural resources, in conformity with national interests, and the environmental protection and recovery, as well as preservation of the ecological balance.”*² In its chapter dedicated to fundamental rights, the Constitution connected the fundamental right to property to a certain specific environmental obligation, stating expressly that *“The right of property compels to the observance of duties relating to environmental protection and ensurance of neighborliness, as well as of other duties incumbent upon the owner, in accordance with the law or custom.”*³ This constitutional provision had to be interpreted through article 15 para. (1), according to which *“All citizens enjoy the rights and freedoms granted to them by the Constitution and other laws, and have the duties*

1 Published in the Official Gazette of Romania, Part I, no. 233 on November 21, 1991.

2 See ex-article 134 para. (2), letters d) and e).

3 See ex-article 41 para. (6).

laid down thereby.” Thus, there was an incumbent duty for the owners to protect the environment; however, an explicit right of human beings to a healthy environment was not enacted.

The Constitution was amended and completed via the addition of Law no. 429/2003⁴ on the revision of the Constitution of Romania,⁵ which, in addition to the aforementioned norms, introduced a new fundamental right in the catalog of the fundamental rights and freedoms comprised by the Constitution of Romania, namely the right to a healthy environment. This new fundamental right is a social-economic right and is provided by article 35 of the Constitution, according to which:

(1) The State shall acknowledge the right of every person to a healthy, well preserved and balanced environment. (2) The State shall provide the legislative framework for the exercise of such right. (3) Natural and legal entities shall be bound to protect and improve the environment.

As a consequence, the Constitution of Romania contains references to environmental issues in three articles: article 35 on the right to a healthy environment, article 44 para. 7 concerning the relationship between the right to property and environmental duties⁶; and article 135 para. (2) letter e), concerning state obligations regarding environmental matters.⁷ In addition to these legal norms, there are other texts in connection with these, namely article 34, the right to protection of health; article 45, economic freedom; or article 135 para. (2) letters d) and f)⁸ concerning the state obligations to ensure the exploitation of natural resources in conformity with national interests and to create all necessary conditions so as to increase the quality of life. In a broader sense, article 32, *Right to education*, and article 33, *Access to culture of the Constitution*, can also be mentioned, particularly the final paragraph of the latter, according to which “(3) *The State must make sure that spiritual identity is preserved, national culture is supported, arts are stimulated, cultural legacy is protected*

4 According to article 73 para. (1) and (2) of the Constitution, Parliament passes three types of laws, one of them being the constitutional laws that pertain to the revision of the Constitution.

5 Published in the Official Gazette of Romania, Part I, no. 758 on October 29, 2003. Law no. 429/2003 on the revision of the Constitution of Romania was approved by the national referendum of October 18-19, 2003, and entered into force on October 29, 2003, the date of the publication in the Official Gazette of Romania, Part I, no. 758 on October 29, 2003, of Decision of the Constitutional Court no. 3 of October 22, 2003, regarding the confirmation of the result of the national referendum of October 18-19, 2003, concerning the Law on the revision of the Constitution of Romania. The Constitution – as amended by Law no. 429/2003 – was republished in the Official Gazette of Romania, Part I, no. 767 on October 31, 2003.

6 Ex-article 41 para. (6) of the initial version of the Constitution.

7 Ex-article 134 para. (2), letter e) of the initial version of the Constitution.

8 These two legal norms provide that the State shall secure the exploitation of natural resources, in conformity with national interests [letter d)] and the creation of all necessary conditions so as to increase the quality of life [letter f)].

and preserved, contemporary creativity is developed, and Romania's cultural and artistic values are promoted throughout the world."⁹

Notably, in the entire constitutional history of Romania,¹⁰ this is the first time an act of constitutional nature provided for a set of fundamental rules or principles that concerns the protection of the environment. This initial openness of the Constitution of Romania to new values may be explained considering that the Commission for the Drafting of the Constitution created a documentary fund, which included the constitutions of democratic states, studies in the field of constitutional law, and international legal literature on matters to be regulated by the provisions of the Basic Law and initiated working meetings with European specialists.¹¹ However, as we noted, the right to a healthy environment became part of the Constitution in 2003 on the occasion of its sole amendment. Throughout this entire period (1991–2003), even if the right at stake was not covered by a normative provision of the Constitution, this does not mean that it was not implicitly recognized,¹² taking into account that there were adopted legislative acts that concerned the protection of the environment¹³; however, there was little concern regarding this matter during the post-communist transition. When the fundamental right itself was enacted, the legal literature emphasized that this decision was a matter of course and took into consideration the intrinsic importance of this third-generation right, the international and European orientations in this specific field, and the requirements for the accession of Romania to the European Union, wherein the protection of the environment represents a priority for EU policies.¹⁴

The sphere of protection of this fundamental right is not limited only to ensuring a viable surrounding nature that supports human life. On the one hand, the right to a healthy environment supposes ensuring a high-quality environment and preserving environmental elements, and on the other hand, an ecologically balanced environment means the protection of those relationships between the elements of an ecologic system that ensure the preservation, operation, and an ideal dynamic.¹⁵

9 It worth mentioning that, unfortunately, there is no relevant case law of the Constitutional Court that would valorize the link between these two constitutional provisions and the right to a healthy environment.

10 This is considering a period of more than 150 years, as the first Constitution of the United Principalities of Moldavia and Wallachia was adopted in 1866.

11 Enache, 2021, p. 82.

12 Duțu, 2013, p. 15. The author cites (pp. 15–16) a Supreme Court decision (no. 1112/1997), in which the right to a healthy environment is recognized as a subjective and fundamental right derived from the general obligation of the State to secure environmental protection and recovery as well as the preservation of ecological balance, even if the right at stake is not listed in the catalog of fundamental rights and freedoms provided by the Constitution.

13 See, for example, Law no. 84/1993 for the accession of Romania to the Vienna Convention for the Protection of the Ozone Layer, published in the Official Gazette of Romania, Part I, No. 292 on December 15, 1993.

14 Selejan–Guțan, 2008, p. 326. See also Decision no. 54/2022, published in the Official Gazette of Romania, Part I, No. 212 on March 3, 2022, para. 63.

15 Ibid, pp. 27–28.

The holder of the right to a healthy environment is the human being, regardless of its citizenship or civil status, and this right can be exercised either individually or collectively; in the latter case, non-governmental organizations having an important role.¹⁶ Regarding its nature, it is a right of solidarity between the present generation and future generations. The former expresses the common interest of humanity and the interdependence between the individuals of the same species and the surrounding nature, while the latter expresses the right of future generations to inherit a high-quality environment that supposes an obligation in terms of the preservation of nature in the long term and the application of policies that promote sustainable development.¹⁷

In accordance with the Constitutional Court case law, the right to a healthy environment means taking all necessary measures to ensure the increased quality of the environment, while maintaining a healthy environment means, in reality, preserving and improving the conditions of quality of life to maintain ecological balance.¹⁸

The Court held that the state has both negative and positive obligations. With regard to positive obligations, they imply the creation of a legislative and administrative framework aimed at the effective prevention of damage to the environment and human health. Thus, the normative framework must be aimed at preventing environmental degradation, establishing the necessary remedies, and regulating the sustainable use of natural resources.¹⁹ To fulfill its obligations of protection, the state must adopt, in a sufficient way, normative measures that lead to a real exercising of each person's right to a healthy environment.²⁰

An attempt was made to modify this constitutional text in 2014. The proposal of the amendment indicated an intention to add two more paragraphs to article 35 as follows:

“(2’) The state ensures the protection, sustainable use and restoration of the natural heritage.

(3’) Ill-treatment of animals, as defined by law, is prohibited.”

Performing a constitutional review on the proposed constitutional amendment,²¹ the Constitutional Court stated that the wording of the latter paragraph contains a

¹⁶ Ibid, p. 29.

¹⁷ Ibid, p. 30.

¹⁸ Decision no. 295/2022, published in the Official Gazette of Romania, Part I, no. 568 on June 10, 2022, para. 173.

¹⁹ Decision no. 80/2014, published in the Official Gazette of Romania, Part I, no. 246 on April 7, 2014, para. 401.

²⁰ Decision no. 295/2022, para. 174.

²¹ According to article 146 letter a) 2nd indent, the Constitutional Court has the attribution to review, ex officio, the constitutionality of the initiatives to revise the Constitution. This review is performed before the initiative is submitted to Parliament; it is meant to verify the observance of the procedural requirements for the submission of the initiative, on the one hand, and of the substantive limits of revision, the so-called eternal clauses, on the other hand. These clauses are enacted in article 152 para. (1) and (2) of the Constitution, according to which *“(1) The provisions of this Constitution with regard to the national, independent, unitary and indivisible character of the Romanian State, the repub-*

standard of conduct but is imprecise, as it is not clear whether the phrase “defined by law” refers to animals or to ill treatment. The Court recommended the reformulation of the text.²²

The same proposal to amend the Constitution attempted to reword article 135 para. (2) letters d) and e) as follows:

The state guarantees and promotes the increase of the competitiveness of the Romanian economy by:

- d) the exploitation of the production resources in conditions of maximum economic efficiency and with the granting of non-discriminatory access to all those interested;
- e) economic development in terms of environmental protection and maintaining the ecological balance.

In the same decision, the Court noted that article 135 para. (2) letter d) stipulates that the state must ensure “the exploitation of natural resources, in accordance with the national interest”, while the proposed amendment eliminates the reference to the national interest, replacing it with maximized economic efficiency. The Court observes that the action of the State in accordance with the national interest is a guarantee for citizens regarding the protection of their rights and freedoms. Thus, the Court finds that the desired amendment ignores the general interest transposed in the concept of the national interest in favor of a particular interest. The Court finds that the amendment to the provision of article 135 para. (2) letter d) exceeds the limits of the revision, as they are provided in article 152 para. (2) of the Constitution.²³

Regarding letter e), para. (2) article 135, the Court has noted that in the current wording, the state must ensure the restoration and protection of the environment, and maintain the ecological balance, while the draft revised law provides that the state guarantees economic development while protecting the environment and maintaining ecological balance. The Court observes that the current text of the Basic Law corresponds exclusively to the positive obligation of the state correlative to the right to a healthy environment provided by article 35 of the Constitution. On the other hand, the proposed amendment highlights economic development, as it is the one guaranteed and promoted by the state. The court considers that this leads to a change in the wording of the text, which excludes the obligation of the state to restore and protect the environment and to maintain ecological balance. The Court notes that the State has both negative and positive obligations with regard to the right to a healthy environment, and the measures in question must thus be aimed at preventing environmental degradation, establishing the necessary remedies,

lican form of government, territorial integrity, independence of justice, political pluralism and official language shall not be subject to revision.

(2) Likewise, no revision shall be made if it results in the suppression of the citizens' fundamental rights and freedoms, or of the safeguards thereof.”

²² Decision no. 80/2014, para. 130–132.

²³ Decision no. 80/2014, para. 395–398.

and regulating the sustainable use of natural resources. The Court finds that the amendment to the provision of article 135 para. (2) lit. e) results in the suppression of the guarantee of the right to a healthy environment provided by article 35 of the Fundamental Law, violating article 152 para. (2) of the Constitution.²⁴

One specific constitutional guarantee of the right to a healthy environment is the obligation to protect and improve the environment, an obligation that only exists in correlation with this specific right and does not exist independently as in the case of other fundamental duties provided by the Constitution.²⁵ The legal procedural guarantees of this fundamental right are as follows²⁶: (a) the access to environmental information in compliance with the requirements of confidentiality; (b) the right of association in environmental protection organizations; (c) the right to be consulted in the decision-making process concerning environmental policies, programs, and legislation; (d) the right to address to the administrative and judicial authorities in environmental matters regardless of whether environmental damage has occurred; and (e) the right to compensation for damages.

In this context, it is of paramount importance to mention that article 152 para. (2) of the Constitution stipulates that no revision of the Constitution shall be made “if it results in the suppression of the citizens’ fundamental rights and freedoms, or of the safeguards thereof.” It is an eternity clause²⁷ and a limit imposed on the delegate constituent power, being precluded its possibility to affect the existing rights, freedoms, and guarantees enshrined in the Constitution precluded. As a consequence, the protection of human beings cannot have a descending orientation through constitutional revision.²⁸ Taking into consideration the aforementioned factors, the right to a healthy environment cannot be eliminated from the Constitution, and its level of protection cannot be affected either directly (through its direct amendment) or indirectly (through the amendment of other constitutional texts that are connected to this fundamental right).

Regarding the protection of future generations, there are no explicit texts in the Constitution; this can eventually be deduced from article 35 as a consequence or an intrinsic part of the right to a healthy environment. Moreover, there is no explicit rule regarding the state’s conduct toward future generations, but when the Constitution refers to the exploitation of natural resources in conformity with national interests or when it establishes that certain assets belong to the state, we can conclude that

²⁴ Decision no. 80/2014, para. 399–402.

²⁵ Duțu, *ibid.*, p. 25.

²⁶ Duțu, *ibid.*, p. 23 and pp. 31–35.

²⁷ The Venice Commission advocates for a restrictive and careful approach to the interpretation and application of “unamendable” provisions. It notes that the principles and concepts protected by unamendability provisions should, to a certain extent, be open to dynamic interpretation; see the European Commission for Democracy through Law (Venice Commission) – Report on constitutional amendment, adopted by the Venice Commission at its 81st Plenary Session (Venice, December 11–12, 2009), para. (220) and (221).

²⁸ See Decision no. 80/2014, para. (65).

all of these regulations are created taking into consideration not only the present interest of the state or of the present generation but the interest of future generations as well. In this sense, the Constitution provides that the mineral resources of public interest, the air, the waters with energy potential that can be used for national interests, the beaches, the territorial sea, the natural resources of the economic zone and the continental shelf, and other possessions established by organic law shall be exclusively public property. Moreover, public property is inalienable.²⁹

The Constitution does not include an express provision on sustainability as a principle of budgetary management. The only aspect mentioned is that “No budget expenditure shall be approved unless its financing source has been established” (article 138 para. (5) of the Constitution). A budgetary rule, *lato senso*, protects the future generations as well. In 2011, at the proposal of the government, the President of Romania initiated a law for the amendment of the Constitution that *inter alia* proposed a normative text concerning rules on financial policy. In reviewing this initiative,³⁰ the Constitutional Court noted that the revision law enshrines, at the level of the legal norm of constitutional rank, the principle of budgetary balance: the regulation of a maximum budget deficit of 3% of the gross domestic product and of a public debt that cannot exceed 60% of the gross domestic product. The proposal is based on the need to convert into a criterion of constitutionality the economic requirement regarding budgetary discipline and rigor and does not violate the limits of the revision of the Constitution provided by article 152 para. (1). However, afterward, in 2013, the Parliament rejected the President’s initiative.³¹

2. Legislative acts concerning the right to a healthy environment

2.1. Preliminary remarks

According to article 1 para. (4) of the Constitution, the State shall be organized based on the principle of the separation and balance of powers – legislative, executive, and judicial – within the framework of constitutional democracy. Each power has well-established competence and must exercise it in the environmental field as well.

In terms of competence, every public authority must exercise its competence within the limits provided by the Constitution and the laws. According to article 61 para. 1 of the Constitution, the Parliament is the supreme representative body

29 See article 136 para. (3) and (4) of the Constitution.

30 Decision no. 799/2011, published in the Official Gazette of Romania, Part I, no. 440 on June 23, 2011.

31 See http://www.cdep.ro/pls/proiecte/upl_pck2015.proiect?cam=2&idp=12163. Accessed: 12 June 2022.

of the Romanian people and the sole legislative authority of the country. In addition, however, the government can adopt legislative acts with the force of law through legislative delegation; that is, it can adopt ordinances or emergency ordinances. Therefore, in the environmental field, the state can adopt laws, ordinances, and emergency ordinances, all these being primary regulations. Notably, criminal offenses, whether they are connected to the environment field or to another field, can be regulated only by organic law – passed by the majority vote of the members of each Chamber – and emergency ordinances.³²

According to article 108 para. (2) of the Constitution, the government can issue decisions to organize the execution of laws. This means that the premise of the adoption of such a decision is the prior existence of a legislative act, as decisions are not a source of law. The Constitution does not contain provisions concerning the acts of the other central public authorities, but Law no. 24/2000 specifies that normative orders, instructions, and other such acts of the heads of ministries and other bodies of the specialized central public administration or of the autonomous administrative authorities are issued only on the basis and in the execution of laws, decisions, and ordinances of the government. Additionally, there is no constitutional obligation that, first, the organization of the law be carried out by a decision of the government and only in the application of the decision of the government, conditioned by its existence, to adopt orders of the Minister. Such a rule would lead to an excessive stiffening of the legislative process and to the overloading of the normative system. Therefore, the identification of the most appropriate instrument for law enforcement does not follow an algorithmic structure and is likely to require a predefined hierarchy; however, it takes into account primarily the need for regulation and the material competence of the issuing body.³³

2.2. General laws

As long as the state recognizes the right of every person to a healthy and ecologically balanced environment, it must ensure the legislative framework for the exercise of this right.³⁴

The general law on the protection of the environment is Government Emergency Ordinance no. 195/2005.³⁵ This ordinance lays down a set of legal regulations on environmental protection, an objective of major public interest, based on the principles

32 See article 73 para. (3) letter h) and article 115 para. (1), (4), and (6) of the Constitution.

33 Decision no. 16/2022, published in the Official Gazette of Romania, Part I, no. 59 on January 19, 2022, para. (17).

34 Decision no. 511/2017, published in the Official Gazette of Romania, Part I, no. 788 on October 4, 2017, para. (14).

35 Published in the Official Gazette of Romania, Part I, no. 1196 of December 30, 2005. This emergency ordinance is the third normative act on environmental protection adopted in the history of Romania. The first two are Law no. 9/1973, published in the Official Gazette of Romania, no. 91 on June 23, 1973 (adopted immediately after the Stockholm Declaration of 1972), and Law no. 137/1995, published in the Official Gazette of Romania, Part I, No. 304 on December 30, 1995 (repealed by Government Emergency Ordinance no. 195/2005).

and strategic elements that lead to sustainable development. According to this legislative act, the environment represents the set of conditions and natural elements of the Earth: air, water, soil, subsoil, characteristic aspects of the landscape, all atmospheric layers, and all organic and inorganic substances as well as living beings, interacting natural systems including the listed elements and some material and spiritual values, quality of life, and the conditions that may affect human well-being and health.

All of these elements of the environment are regulated by diverse legislative acts as follows: (a) air: Law no. 104/2011 on ambient air quality,³⁶ Law no. 173/2008 on active interventions in the atmosphere,³⁷ or Law no. 293/2018 on reducing national emissions from certain air pollutants³⁸; (b) water: Water Law no. 107/1996³⁹ and Law no. 458/2002 on drinking water quality⁴⁰; (c) soil: Law no. 246/2020 on land use, conservation, and protection⁴¹; (d) forests: Law no. 57/2020 on the sustainable management of Romania's forests⁴²; (e) organic and inorganic substances/living beings: Government Emergency Ordinance no. 57/2007 on the regime of protected natural areas, conservation of natural habitats, and wild flora and fauna⁴³ or Government Emergency Ordinance no. 59/2007 on the establishment of the National Program for improving the quality of the environment by creating green spaces in localities and Law no. 407/2006 on hunting and the protection of the hunting resources⁴⁴ or Government Emergency Ordinance no. 23/2008 on fisheries and aquaculture⁴⁵; (f) spiritual values: Law no. 26/2008 on the protection of intangible cultural heritage⁴⁶; (g) material cultural heritage: Government Ordinance no. 68/1994 on the protection of national cultural heritage⁴⁷ or Law no. 182/2000 on the protection of national mobile cultural heritage.⁴⁸ It seems that in the near future, a Code on cultural heritage will be adopted as a government decision has been adopted for the approval of the preliminary theses of the draft Cultural Heritage Code.⁴⁹

36 Published in the Official Gazette of Romania, Part I, no. 452 on June 28, 2011.

37 Published in the Official Gazette of Romania, Part I, no. 715 on October 21, 2008.

38 Published in the Official Gazette of Romania, Part I, no. 1042 on December 7, 2018.

39 Published in the Official Gazette of Romania, Part I, no. 244 on October 8, 1996.

40 Republished in the Official Gazette of Romania, Part I, no. 875 on December 12, 2011.

41 Published in the Official Gazette of Romania, Part I, no. 1057 on November 10, 2020.

42 Published in the Official Gazette of Romania, Part I, no. 402 on May 15, 2020.

43 Published in the Official Gazette of Romania, Part I, no. 442 on June 29, 2007. Concerning this emergency ordinance, the Constitutional Court stated that its purpose is to guarantee the conservation and sustainable use of natural heritage, an objective of major public interest, and a fundamental component of the national strategy for sustainable development, which regulates, among others, the categories of protected natural areas, its regime, and the regime of the administration of protected natural areas (Decision no. 385/2020, published in the Official Gazette of Romania, Part I, no. 145 on February 12, 2021, para. 27.)

44 Published in the Official Gazette of Romania, Part I, no. 944 on November 22, 2006.

45 Published in the Official Gazette of Romania, Part I, no. 180 on March 10, 2008.

46 Published in the Official Gazette of Romania, Part I, no. 168 on March 5, 2008.

47 Published in the Official Gazette of Romania, Part I, no. 247 on August 31, 1994.

48 Republished in the Official Gazette of Romania, Part I, no. 259 on April 9, 2014.

49 See Government Decision no. 905/2016, published in the Official Gazette of Romania, Part I, no. 1047 on December 27, 2016.

Government Emergency Ordinance no. 196/2005⁵⁰ created the Environmental Fund; this Fund is an economic and financial instrument intended to support and implement projects and programs for the protection of the environment and for the achievement of the objectives of the European Union in the field of environment and climate change in accordance with the legal provisions in force.⁵¹

Moreover, Law no. 292/2018 on assessing the impact of certain public and private projects on the environment must be mentioned.⁵² This law regulates the environmental agreement as the administrative act issued by the competent authority for environmental protection that establishes the conditions and measures for environmental protection and must be observed when planning a project.

Law no. 278/2013 on industrial emissions⁵³ regulates the prevention and integrated control of pollution resulting from industrial activities, establishing the conditions for the prevention or, where possible, reduction of emissions impacting air, water, and soil as well as a high level of environmental protection, considered as a whole.

Law no. 82/1993 established the Danube Delta Biosphere Reserve⁵⁴ as an area of national and international ecological importance. To ensure the protection and

50 Published in the Official Gazette of Romania, Part I, no. 1193 on December 30, 2005.

51 See Constitutional Court Decision no. 485/2017, published in the Official Gazette of Romania, Part I, no. 783 on October 3, 2017, para. (22). According to article 13 para. (1) of the Act, the Environmental Fund finances pilot projects/programs for environmental protection that concern reducing the impact on the atmosphere, water and soil, including monitoring air quality; noise reduction; waste management; protection of water resources, integrated water supply systems, treatment plants, sewers, and treatment plants; integrated coastal zone management; biodiversity conservation and the management of protected natural areas; afforestation of degraded lands and ecological reconstruction and sustainable management of forests; education and public awareness on environmental protection; increasing the production of energy from renewable sources; restoring land in the natural circuit; restoration of historically contaminated sites, excepting those regulated by special laws; the application of clean technologies, including, but not limited to, coal gasification and high-efficiency cogeneration; conducting monitoring, studies, and research in the field of environmental protection and climate change on tasks arising from international agreements, European directives, or other national or international regulations as well as research and development in the field of climate change; modernization and rehabilitation of energy groups; the closure of tailings ponds in the mining sector; carrying out works intended to prevent, remove, and/or reduce the effects produced by extreme meteorological phenomena as well as other harmful factors in accordance with the law; installation of heating systems using renewable energy, including replacement or completion of conventional heating systems; the national program for improving the quality of the environment by creating green spaces in urban areas; the National Car Park Renewal Stimulation Program; the renewal of the National Park of Tractors and Self-Propelled Agricultural Machines Stimulation Program; the program for the construction of tracks for cyclists in urban and peri-urban areas; the National Air Quality Monitoring Network's development and optimization program; the reduction of greenhouse gas emissions in transport by promoting energy-free road transport vehicles; performing works for energy efficiency; reduction of greenhouse gas emissions in agriculture; the program for the development and optimization of the National Network for Environmental Radioactivity Surveillance; the waste assessment, characterization, and classification program; the Environmental Infrastructure Investment Financing Program for Selective Waste Collection, Treatment, and Recycling.

52 Published in the Official Gazette of Romania, Part I, no. 1043 on December 10, 2018.

53 Published in the Official Gazette of Romania, Part I, no. 671 on November 1, 2013.

54 Published in the Official Gazette of Romania, Part I, no. 283 on December 7, 1993.

conservation of natural habitat areas and specific biological diversity as well as to capitalize on available natural resources, according to the consumption requirements of local populations and within the limits of the natural biological potential for regeneration of these resources, the following areas have different ecological protections: (a) strictly protected areas with a conservation regime of scientific reservations; (b) buffer zones, with the role of protection of strictly protected areas and in which limited activities of capitalization on the available resources are permitted in accordance with the approved management plans; (c) areas of sustainable development, which are economically exploitable through traditional practices or new technologies and are ecologically accepted; and (d) areas of ecological reconstruction, in which measures are taken only to restore the damaged environment and which later become areas of sustainable development or strictly protected areas.

2.3. Civil law

The Romanian Civil Code does not include a special chapter on liability in relation to environmental issues. As a consequence, the provisions that regulate the tort liability in the code shall be applied in regard to those environmental issues, meaning the legal duty to compensate someone for damages caused. Article 1349 para. 1 and 2 of the code states that every person has the duty to observe the rules of conduct imposed by the law or custom of the place and not to infringe, through his actions or inactions, on the rights or legitimate interests of other persons. A person who, having discernment, violates this duty is responsible for all damages caused and is obliged to repair them in full.

The Civil Code includes two specific provisions concerning the environment. One of these provisions is article 603, according to which “The right of property compels to the observance of duties relating to environmental protection and ensurance of neighborliness, as well as of other duties incumbent upon the owner, in accordance with the law or custom.” This article is identical to article 44 para. (7) of the Constitution. The other provision is article 2518, which provides for a limitation period of 10 years for bringing proceedings to repair the damage caused to the environment. This is a special limitation period; as the general rule, the length of limitation periods is three years, according with article 2517 of the same Act. This is the longest limitation period enacted in the Civil Code.

We must emphasize that in this specific field, a special normative act, namely Government Emergency Ordinance no. 68/2007 on environmental liability, regulates the prevention and repair of environmental damage.⁵⁵ This normative act establishes the framework for environmental liability based on the “polluter pays” principle to prevent and repair environmental damage. Its ambit covers the following situations:

a) damage to the environment caused by any type of professional activity and any imminent threat of such harm caused by any of these activities

55 Published in the Official Gazette of Romania, Part I, no. 680 on October 9, 2007.

b) damage to protected species and natural habitats and any imminent threat of such damage caused by any professional activity when the operator acts intentionally or through fault

This act applies to environmental damage or an imminent threat of such damage caused by diffuse pollution only when a causal link can be established between the damage and the activities of individual operators. However, this emergency ordinance does not entitle individuals or legal entities under private law to compensation as a consequence of environmental damage or the imminent threat of such damage. In these situations, the provisions of the Civil Code (article 3 para. (4)) apply.

2.4. *Contravention law*

The general regime of the contraventions in the Romanian legal system is regulated by Government Ordinance no. 2/2001.⁵⁶ The contraventions are subject to an administrative regime,⁵⁷ but in the same decision, the Constitutional Court stated that, in accordance with the case law of the European Court of Human Rights, a contravention can be considered a “criminal” offense within the meaning of article 6 of the European Convention of Human Rights if the Engel criteria are met.⁵⁸

For environmental issues, the general *sedes materiae* is article 96 of Emergency Ordinance no. 195/2005, which comprises 81 contraventions applicable to both natural and legal persons. The sectorial acts regulate specific contraventions in their particular sphere; e.g. article 87 of Water Law no. 107/1996 regulates 67 specific contraventions to the water regime.

2.5. *Criminal law*

The most important normative act that regulates criminal offenses in the environment field is Emergency Ordinance no. 195/2005. Article 98 of the act provides the framework for the protection of the environment by way of criminal norms.⁵⁹

56 Published in the Official Gazette of Romania, Part I, no. 410 on July 25, 2001.

57 See Constitutional Court Decision no. 197/2003, published in the Official Gazette of Romania, Part I, no. 545 on July 29, 2003.

58 The three Engel criteria are as follows: the text defining the offense at issue belongs, according to the legal system of the respondent State, to criminal law; the nature of the offense and the nature and degree of severity of the penalty that the person concerned risked incurring must be examined with regard to the object and purpose of article 6, to the ordinary meaning of the terms of that article, and to the laws of the Contracting States.

59 It provides the following: “(1) The following acts constitute criminal offenses and shall be punished by imprisonment from 3 months to one year or by a fine, if they were likely to endanger the life or health of humans, animals or plants:

- a) burning of stubble, reeds, shrubs and grassy vegetation in protected areas and on lands subject to ecological restoration
- b) accidental pollution due to non-supervision of the execution of new works, operation of installations, technological equipment and treatment and neutralization, mentioned in the provisions of the environmental agreement and / or the integrated environmental authorization / authorization

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- (2) The following acts constitute criminal offenses and shall be punished by imprisonment from 6 months to 3 years or by a fine, if they were likely to endanger the life or health of humans, animals or plants:
- a) pollution by the discharge, in the atmosphere or on the ground, of some wastes or dangerous substances
 - b) the production of noise beyond the permitted limits, if this seriously endangers human health
 - c) continuation of the activity after the suspension of the environmental agreement or of the authorization, respectively of the integrated environmental authorization
 - d) the import and export of prohibited or restricted dangerous substances and preparations
 - e) failure to report immediately on any major accident by persons in charge of this obligation
 - f) the production, delivery or use of chemical fertilizers, as well as any unauthorized plant protection products, for crops intended for sale
 - g) non-compliance with the prohibitions regarding the use on agricultural lands of plant protection products or chemical fertilizers
 - h) the production, import, export, placing on the market or use of substances that deplete the ozone layer, in violation of the relevant legal provisions
- (3) The following acts constitute criminal offenses and shall be punished by imprisonment from 6 months to 3 years, if they were likely to endanger the life or health of humans, animals or plants:
- a) non-supervision and non-insurance of landfills of waste and hazardous substances, as well as non-compliance with the obligation to store chemical fertilizers and plant protection products only packaged and in protected places
 - b) the production or import for the purpose of placing on the market, as well as the use of dangerous substances and preparations without complying with the provisions of the normative acts in force and the introduction on the Romanian territory of waste of any nature for the purpose of their elimination
 - c) the transport and transit of dangerous substances and preparations, in violation of the legal provisions in force
 - d) carrying out activities with genetically modified organisms or their products, without requesting and obtaining the import / export agreement or the authorizations provided by the specific regulations
 - e) cultivation of genetically modified higher plants for testing or commercial purposes, without the registration required by law
 - f) the operation, in violation of the legal provisions in the field, of an installation in which a dangerous activity is carried out or in which dangerous substances or preparations are stored or used, likely to cause outside the installation the death or personal injury of a person or damage significant impact on the environment
- (4) The following acts constitute criminal offenses and shall be punished by imprisonment from one to 5 years, if they were likely to endanger the life or health of humans, animals or plants:
- a) provocation, due to non-monitoring of ionizing radiation sources, environmental contamination and/or exposure of the population to ionizing radiation, failure to promptly report the increase beyond the permitted limits of environmental contamination, improper application or failure to intervene in case of nuclear accident
- a1) the discharge, emission or introduction, in violation of the legal provisions in the field, of sources of ionizing radiation in air, water or soil that are likely to cause environmental contamination or exposure of the population to ionizing radiation
- b) the discharge of wastewater and waste from ships or floating platforms directly into natural waters or the deliberate provocation of pollution by the discharge or sinking into natural waters, directly or from ships or floating platforms, of dangerous substances or waste
- (5) The following acts constitute criminal offenses and shall be punished by imprisonment from 2 to 7 years:
- a) continuation of the activity that caused the pollution after the disposition of the cessation of this activity
 - b) failure to take measures for the total disposal of hazardous substances and preparations that have become waste
 - c) refusal to intervene in case of accidental pollution of waters and coastal areas
 - d) refusal to control the introduction and removal from the country of dangerous substances and preparations or introduction into the country of crops of microorganisms, plants and live animals of wild flora and fauna, without the consent of the central public authority for environmental protection

The Romanian Criminal Code criminalizes certain behaviors that affect the quality of the environment and endanger public health; namely, article 355 criminalizes the spread of diseases to animals or plants,⁶⁰ and article 356 criminalizes water pollution.⁶¹

Distinctively, article 442 para. (2) of the Criminal Code provides that “Carrying out an attack by military means, in an international armed conflict, knowing that it will cause extensive, lasting and serious damage to the environment, which would have been clearly disproportionate to the overall concrete and directly expected military advantage, is punishable by imprisonment from three to 10 years and a ban on exercising certain rights.” This criminal offense is considered a war crime and is part of the homonym chapter.

3. International treaties

According to article 11 para. (2) and article 20 para. (2) of the Constitution, the treaties ratified by Parliament are part of national law, and where any inconsistencies exist between the covenants and treaties on the fundamental human rights to which Romania is a party and the national laws, the international regulations shall take precedence unless the Constitution or national laws comprise more favorable provisions.⁶² Moreover, article 20 para. (1) of the Constitution provides that consti-

(6) The attempt shall be punished.

(7) In the case of the offenses provided in par. (2) letter a) and h) and par. (4) letter a'), committed by negligence, the punishment limits are reduced by half.

(8) The offense provided in par. (3) lit. letter f), committed through by negligence, shall be punished with imprisonment, provided in par. (3), whose special limits are reduced by half, or with a fine.

(9) By derogation from the provisions of article 137 para. (2) of Law no. 286/2009 on the Criminal Code, as subsequently amended and supplemented, in the case of the criminal offenses provided for in this article, the amount corresponding to one day-fine for the legal person is between 500 lei and 25,000 lei.”

60 “(1) Failure to comply with the measures regarding the prevention or control of infectious diseases in animals or plants or pests, if it has resulted in the spread of such a disease or pests, shall be punished by imprisonment from 3 months to 3 years or by a fine.

(2) If the act is the result of negligence, the special limits of the punishment shall be reduced to half.”

61 “(1) Pollution by any means of water sources or networks, if the water becomes harmful to the health of humans, animals or plants, shall be punished by imprisonment from one to 5 years.

(2) If the act is the result of a negligence, the punishment is imprisonment from 6 months to 3 years or a fine.

(3) By exception from the provisions of article 137 para. (2), in the case of the offense provided in this article, the amount corresponding to one day-fine for the legal person is between 500 lei and 25,000 lei.

(4) The attempt shall be punished.”

62 To avoid the ratification of international agreements/treaties contrary to the Constitution, the Constitutional Court was vested with the power to adjudicate on the constitutionality of treaties or other international agreements upon notification (article 146 letter b) of the Constitution). However, the Court has not exercised this competence as of this writing.

tutional provisions concerning the citizens' rights and liberties shall be interpreted and enforced in conformity with the Universal Declaration of Human Rights as well as with the covenants and other treaties to which Romania is a party.

Taking into account that the content of the constitutional norms is shaped by the provisions of ratified international agreements/treaties, the Constituent Assembly implicitly imposed a level of constitutional protection regarding fundamental rights and freedoms at least at the level provided for in international acts; as a result, the guarantees of a certain complex constitutional right included in ratified international acts can be constitutionalized through the Constitutional Court's case law.⁶³

All of these are legal consequences of article 11 para. (1) of the Constitution, according to which the Romanian State pledges to fulfill, as such and in good faith, its obligations as derived from the treaties to which it is a party. This reflects the application of one of the fundamental principles of trust between states in their international relations, the *pacta sunt servanda principle*, according to which states have the obligation to respect and apply, accurately and in good faith, the treaties to which they are a party; otherwise, the states' liability may be engaged.⁶⁴

Regarding environmental policy, Romania seems open to any initiative that aims to improve the legislative framework targeting the protection, conservation, and development of the environment as it has ratified a significant number of treaties, conventions, and agreements concluded on the international, European, and regional levels.

3.1. Ratified international treaties in the environmental field

The first world conference on the human environment was held in Stockholm from June 5 to 16, 1972, and is considered the founding moment for international environmental law and the decisive catalyst for the affirmation of environmental law in general.⁶⁵ The Eastern bloc – lead by the Soviet Union – boycotted the conference, but Romania did not do so.⁶⁶

Romania ratified the Framework Convention on Climate Change⁶⁷; the Convention on Biological Diversity⁶⁸; the Convention on Access to Information, Public

63 See Constitutional Court Decision no.64/2015, published in the Official Gazette of Romania, Part I, no. 286 on April 28, 2015, para. 23 and 25.

64 See Constitutional Court Decision no.195/2015, published in the Official Gazette of Romania, Part I, no. 396 on June 5, 2015, para. 23.

65 Duțu, 2021, *online*. The same author emphasizes that under the influence of the founding moment in 1972, the first framework regulation on the matter, Law no. 9/1973 on environmental protection, and the first specialized institutionalized structure, the National Council for Environmental Protection (established in 1974), were attempts at a national response within the limits of the historical context.

66 See Sohn, 1973, p. 431.

67 Ratified by Law no. 24/1994, published in the Official Gazette of Romania, Part I, no. 119 on May 12, 1994.

68 Ratified by Law no. 58/1994, published in the Official Gazette of Romania, Part I, no. 199 on August 2, 1994.

Participation in Decision-Making, and Access to Justice in Environmental Matters (Aarhus Convention)⁶⁹; the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention)⁷⁰; the Landscape Convention⁷¹; and the Ramsar Convention on Wetlands of International Importance Especially as Waterfowl Habitat.⁷²

Taking into consideration Romania's geographical position and natural landscape, it concluded numerous regional treaties that concern its topographic elements. The Framework Convention on the Protection and Sustainable Development of the Carpathians, adopted and signed by the Czech Republic, Hungary, Poland, Romania, Serbia, the Slovak Republic, and Ukraine in Kyiv in May 2003 and entered into force in January 2006,⁷³ and the Convention on the Protection of the Black Sea Against Pollution⁷⁴ are worth mentioning. Regarding wildlife, the Convention on International Trade in Endangered Species of Wild Fauna and Flora,⁷⁵ the African-Eurasian Waterbird Agreement,⁷⁶ and the Convention on the Conservation of Migratory Species of Wild Animals⁷⁷ are notable. Romania is also part of the Antarctic Treaty System.⁷⁸

3.2 The Convention for the Protection of Human Rights and Fundamental Freedoms

Romania ratified the Convention for the Protection of Human Rights and Fundamental Freedoms via Law no. 30/1994.⁷⁹ Although there is no explicit right in the Convention to a clean and quiet environment, where an individual is directly and seriously affected by noise, smells, or other pollution, an issue may arise under

69 Ratified by Law no. 86/2000, published in the Official Gazette of Romania, Part I, no. 224 on May 22, 2000.

70 Ratified by Law no. 22/2001, published in the Official Gazette of Romania, Part I, no. 105 on March 1, 2001.

71 Ratified by Law no. 451/2002, published in the Official Gazette of Romania, Part I, no. 536 on, July 23, 2002.

72 Ratified by Law no. 5/1991, published in the Official Gazette of Romania, Part I, no. 18 on January 26, 1991.

73 Ratified by Law no. 389/2006, published in the Official Gazette of Romania, Part I, no. 879 on October 27, 2006.

74 Ratified by Law no. 98/1992, published in the Official Gazette of Romania, Part I, no. 242 on September 29, 1992.

75 Ratified by Law no. 69/1994, published in the Official Gazette of Romania, Part I, no. 211 on August 12, 1994.

76 Ratified by Law no. 89/2000, published in the Official Gazette of Romania, Part I, no. 236 on May 30, 2000.

77 Ratified by Law no. 13/1998, published in the Official Gazette of Romania, Part I, no. 24 on January 26, 1998.

78 Ratified by Decree no. 255/1971, published in the Official Gazette of Romania, no. 91 on July 31, 1971.

79 Published in the Official Gazette of Romania, Part I, no. 135 of 31 May 1994.

Article 8⁸⁰ concerning the right to respect for private and family life, and this article may be applied in environmental cases, whether the pollution is caused directly by the state or the latter's liability results from the absence of adequate regulation of private sector activity. To raise an issue under Article 8, interference must directly affect an applicant's home, family, or private life, and the adverse effects of environmental pollution must attain a certain minimum level of severity. The assessment of that minimum is relative and depends on all of the circumstances of the case, such as the intensity and duration of the nuisance and its physical or mental effects.⁸¹

In the case law of the European Court of Human Rights (hereinafter ECHR), environmental issues that concerned Romania generated some interesting cases. One of these is the *Tătar* judgment⁸² that was delivered in a case concerning an environmental accident – at the site of a gold extracting operator, a dam had breached, releasing about 100,000 m³ of cyanide-contaminated tailing water into the environment – and its effects on the private life of the applicant. After the accident, Mr. Tătar filed administrative complaints concerning the risk incurred by him and his family. The Court observed that pollution could cause a deterioration in the quality of life of the riparian and, in particular, affect the comfort of the applicants and deprive them of the use of their home, so as to affect their private and family life. The State had a duty to ensure the protection of its citizens by regulating the authorization, setting-up, operation, safety, and monitoring of industrial activities, especially activities that are dangerous for the environment and human health. The Court also noted that authorities had to ensure public access to the conclusions of investigations and studies. The Court recalled that access to information, public participation in decision-making, and access to justice in environmental matters are enshrined in the Aarhus Convention of June 25, 1998, and the State has a positive obligation to guarantee the right of members of the public to participate in the decision-making process concerning environmental issues.⁸³ It stressed that the failure of the Romanian government to inform the public, in particular by not making public the 1993 impact assessment on the basis of which the operating license had been granted, had made it impossible for members of the public to challenge the results of that assessment. The Court concluded that the Romanian authorities had failed in their duty to assess to a satisfactory degree the risks that the company's activity might entail and to take suitable measures to protect the rights of those concerned in terms of respect for their private lives and homes under the meaning of Article 8 and, more generally, their right to enjoy a healthy and protected environment.

The Court emphasized that the precautionary principle recommends that States take effective and proportionate measures as soon as possible to prevent the risk of

80 Decision as to admissibility (Application no. 38197/03) Ioan Marchiș and others v. Romania, para. (28), and Decision as to admissibility (Application no. 65175/10.) Fieroiu and others v. Romania, para. (18).

81 Ioan Marchiș and others v. Romania, para. (33).

82 Judgment of January 27, 2009, in *Tătar v. Romania* (Application no. 67021/01).

83 See para. (97), (113) and (118).

serious and irreversible damage to the environment in the absence of scientific or technical certainty. This principle is part of the inherent positive obligations of respecting private or family life imposed on national authorities and applies, a fortiori, to the period following an environmental accident.⁸⁴

An activity incompatible with environmental requirements that generates a high level of pollution and forces people in nearby areas to endure offensive odors may violate article 8 of the Convention. In this context, the Court stated that the lack of state action to cease the activity of a rubbish tip that generated offensive odors affecting a person detained in a nearby prison violates this article.⁸⁵

Notably, the ECHR case law concerning article 10, Freedom of expression, and article 11 concerning freedom of assembly and association has addressed environmental issues in the context of protests against a mining project for gold and silver deposits and of the registration of an environmental association.

In the former case,⁸⁶ the applicant and three other persons decided to express their negative opinion regarding the government's project concerning the mining of gold and silver deposits in Roșia Montană and to raise public awareness of the bill by handcuffing themselves to a barrier, blocking access to the parking area of the government's headquarters, and by holding up signs. The applicant was fined by the police; he contested the fine, but the national courts upheld it. The ECHR noted that the proportionality principle demands a balance to be struck between the requirements of the purposes listed in Article 11 para. (2), on the one hand, and those of the free expression of opinions by word, gesture, or even silence by persons assembled on the streets or in other public places, on the other. The Court concluded that the national courts did not seek to strike this balance, giving the preponderant weight to the formal unlawfulness of the event in question and the imposition of a sanction, administrative or otherwise, however lenient, on the author of an expression that qualifies as political can have an undesirable effect on public speech. The Court considered that the decision to fine the applicant was an unnecessary interference in a democratic society based on the meaning of Article 10 of the Convention. Accordingly, a violation of that Article interpreted in consideration of Article 11 had occurred.⁸⁷

In the latter case,⁸⁸ the EcoPolis association opened proceedings before the Bucharest District Court to seek registration in the Register of Associations and

84 See para. 109 and 120–121.

85 See the Judgment of April 7, 2009, in *Brândușe v. Romania* (Application no. 6.586/03), para. 68–76.

86 See the Judgment of May 3, 2022, in *Bumbeș v. Romania* (Application no. 18079/15), para. 8, 98, 101, 102.

87 The issues of freedom of expression and freedom of peaceful assembly are closely linked in the present case, as the protection of personal opinions, secured by Article 10 of the Convention, is among the objectives of freedom of peaceful assembly as enshrined in Article 11 of the Convention; see para. 67 of the aforementioned decision.

88 See the Judgment of 26 April 2016 in *Costel Popa v. Romania* (Application no. 47558/10), para. 10, 41, 45–47.

Foundations maintained by that court. The District Court granted the registration; however, the County Court considered the objectives of the association⁸⁹ to have been very general and to have run the risk of being understood as belonging to the field of activities of political parties. It noted that the registration of a political party is subject of a different law (Law no. 14/2003) than the law applicable to associations (Government Ordinance no. 26/2000). As a consequence, it quashed the first court judgment and disallowed the registration. The ECHR noted that the last-instance court's statements seem to have been based on mere suspicions regarding the true intentions of the association's founders and the activities it might have engaged in once it had begun to function. The provisions of the association's founding instruments gave no indication that its goal was the setting up of a political party or that it had intended to involve itself in political activities. Moreover, there is no evidence in the case file that the association's founding members had intended to use their association as a *de facto* political party. Had it been founded as an association, their organization would not have been able to take part in the elections and in establishing public authorities. The Court observed that there is no need to speculate as to whether the law on political parties defines any field of activity as an exclusive domain of political parties, which an association is not allowed to enter, and whether the goal and objectives of the applicant's association as described by its memorandum and articles of association could have included any attributes that entered that hypothetical domain. The Court considered that the reasons invoked by the authorities for refusing registration of the EcoPolis association were not guided by any "pressing social need" nor were they convincing or compelling. The measure is disproportionate to the aim pursued; thus, the interference cannot be deemed necessary in a democratic society.

89 The association's goal, as declared in its memorandum of association as well as its articles of association, was that of promoting the principles of sustainable development at the public policy level in Romania. The association's objectives were to increase expertise in the development of sustainable public policies, to improve the process of the development of sustainable public policies by facilitating public participation in and access to relevant information about the environment, to increase the accountability of the relevant official bodies by scrutinizing the implementation of public policies with an impact on the environment, to facilitate the access of official bodies to best practices by examining the Government's environmental initiatives in a European context, to ensure transparency in the work of public institutions and increase their responsibility for their actions in relation to other citizens, to review whether public institutions worked on the basis of principles of sustainability, and to defend the right to a clean environment as provided by international treaties. The activities envisaged by the association aimed at achieving its objectives were *inter alia* research and analysis, public debates and conferences, monitoring the implementation of European Union directives, reviewing the development and implementation of public policies in the environmental field, raising citizens' awareness, informing people of matters of public concern, raising the awareness of the community and of public authorities regarding the need to protect the environment, organizing meetings between citizens and representatives of public authorities, organizing debates and opinion polls on issues impacting the environment, developing programs in partnership with public authorities, the active involvement of citizens in the development of public policies and the decision-making process, improving the legal framework, setting up annual prizes for environmental activities, and networking with similar national and international organizations – see para. 7 of the Judgment.

Taking into consideration the *res interpretata* principle – according to which once the ECHR has made a pronouncement regarding an issue, it is to be expected that the Convention will be interpreted and applied in the same manner if the Court is confronted with the same issue again in a different state⁹⁰ – and the *erga omnes* effects of the ECHR's decisions, the Romanian State has the obligation to observe not only the cases in which it is a party but the entirety of the ECHR's case law in this very specific field.

4. Responsible national authorities for the protection of the environment

Regarding central public authorities that have competences in the areas of managing, monitoring, and controlling the obligations in the environmental field, it must be emphasized that, according to article 116 para. (1) and article 117 para. (1) of the Constitution, ministries should be organized only in subordination to the government and are set up, organized, and function in accordance with the law. This means that the ministries must be set up by an act with the force of law, and the details that concern their organization/ functioning can be regulated by an administrative act.

The Ministry of Environment, Waters, and Forests was established by reorganizing the Ministry of Environment and merging it with the Ministry of Waters and Forests by taking over the activities and structures of the former Ministry of Environment, as well as the units subordinate to, coordinated by and under the authority of the two ministries.⁹¹ As a consequence, the government decision on the organization and operation of the Ministry of Environment, Waters, and Forests was adopted.⁹²

The National Agency for Environmental Protection was established by article 76 of Emergency Ordinance no. 195/2005; it has legal personality, is the specialized body for the implementation of policies and legislation in the field of environmental protection, and is subordinate to the Ministry of Environment, Waters, and Forests. The Administration of the Environmental Fund is established by article 3 para. (1) of Emergency Ordinance no. 196/2005; it has legal personality, ensures the management of the homonymous fund, and is coordinated by the Ministry of Environment, Waters, and Forests.

90 For more details on the principle of *res interpretata*, see Arnardóttir O.M., 2017, pp. 819–843.

91 Article 6 para. (1) of the Government Emergency Ordinance no. 68/2019, published in the Official Gazette of Romania, Part I, no. 898 on November 6, 2019.

92 Government Decision no. 43/2020, published in the Official Gazette of Romania, Part I, no. 55 on January 28, 2020.

The National Agency for Protected Natural Areas was established by Law no. 95/2016⁹³ to ensure the unitary and efficient administration of the protected natural areas regulated by the provisions of Government Emergency Ordinance no. 57/2007. As a consequence, the government decision on the organization and operation of this central public structure was adopted (no. 997/2016). It has legal personality and is subordinate to the Ministry of Environment, Waters, and Forests.

The management of the Danube Delta Biosphere Reservation is carried out by the Danube Delta Biosphere Reserve Administration, a public institution with legal personality financed from the state budget and subordinate to the Ministry of Environment, Waters, and Forests (article 4 of Law no. 82/1993).

Government Decision no. 1005/2012 regulates the organization and functioning of the National Environmental Guard.⁹⁴ It is a specialized inspection and control body, and its commissioners are civil servants appointed to specific public positions in accordance with the law, who may take measures to sanction, suspend, or terminate the activity due to pollution and environmental damage or for non-compliance with the conditions imposed by regulatory acts issued by the competent authority for environmental protection and the measures set out in the notes on the findings and in the inspection and control reports (article 1 para. 2). It has legal personality and is subordinate to the Ministry of Environment, Waters, and Forests.

Government Decision no. 464/2009 approved the Technical Norms regarding the organization and development of control and inspection activities in the field of environmental protection, while Government Decision no. 546/2006 regulates the framework for achieving public participation in the development of certain plans and programs related to the environment.

There are administrative acts enacted by the central public authorities that regulate plans for organizing a specific activity related to the environment, for example, Government Decision no. 942/2017 on the approval of the National Plan on Waste Management, Government Decision no. 53/2009 on the approval of the National

⁹³ The Agency's main tasks are as follows:

- a) proposes elaboration strategies and programs in the field of protected natural areas for protected flora and fauna species
- b) verifies and approves the conservation measures, management plans, and regulations regarding the protected natural areas, which it submits, according to the legal provisions, to the central public authority for the protection of the environment, waters, and forests for approval
- c) coordinates and verifies the implementation by the management structures of the management plans and activities related to the protected natural areas through a unitary, computerized system for managing and updating the electronic database, ensuring the specific monitoring of the natural capital
- d) establishes and implements performance criteria for the evaluation of the administrators of protected natural areas
- e) provides the necessary technical support for the substantiation of normative acts, strategies, and policies regarding protected natural areas as well as harmonization with the *acquis communautaire*, conventions, agreements, and treaties to which Romania is a party.

⁹⁴ It was established by Government Decision no. 1167/2001, published in the Official Gazette of Romania, Part I, no. 789 on December 12, 2001.

Plan for the protection of groundwater against pollution and damage, Government Decision no. 1076/2021 on the approval of the National Integrated Plan in the field of energy and climate change for 2021–2030, Government Decision no. 683/2015 on the approval of the National Strategy and the National Plan for the Management of Contaminated Sites in Romania, and Government Decision no. 893/2006 on the approval of the National Plan for Preparedness, Response, and Cooperation in the Event of Marine Pollution with Hydrocarbons and Other Harmful Substances. Other plans that have a sectorial effect are adopted by the Environmental Minister; examples include Order of the Environmental Minister no. 625/2018 on the approval of the National Action Plan for the conservation of the brown bear population in Romania, Order of the Environmental Minister no. 1992/2014 for the approval of national action plans for cormorants (*Phalacrocorax pygmeus*) and red ducks (*Aythya nyroca*), and Order of the Environmental Minister no. 1327/2014 on the approval of the National Action Plan for the Conservation of the Lesser Spotted Eagle (*Aquila pomarina*) and the Guide to the Habitat Management of the Lesser Spotted Eagle. The central level also has the competence to adopt the acts containing the criteria for financing environmental projects (see, for example, Life Program 2022).

In addition to the government, the President of the Republic is committed to sustaining environmental programs. In 2020, the President of Romania granted patronage to and actively participated in the government's afforestation program *A forest as big as a country* (O pădure cât o țară), in which more than 50 million seedlings were planted. In 2021, the President encouraged responsible institutions, civil society, and the economic environment to increase the level of ambition in this area.⁹⁵

According to article 64 para. 4 of the Constitution, each Chamber may institute inquiry committees or other special committees, and the Chambers may set up joint committees. The role of the special committees is to deliver opinions on complex normative acts and elaborate draft legislative proposals or other purposes specified in the decisions establishing the respective committee.⁹⁶

In environmental matters, taking into consideration that the Romanian authorities approved a concession license for gold mining by a private company in Roșia Montană, on two occasions, the Parliament set up special committees to evaluate the Roșia Montană mining development project (2003)⁹⁷ and a law project related to the exploitation of gold and silver ore in the Roșia Montană perimeter as well as the stimulation and facilitation of the development of mining activities in Romania (2013).⁹⁸ The latter committee developed a report with a special view on the environmental problems of the exploitation project: the use of cyanide; dam and decantation pool safety; the

⁹⁵ See <https://www.presidency.ro/en/commitments/climate-and-sustainability>. Accessed: 12 June 2022.

⁹⁶ See Constitutional Court Decision no.828/2017, published in the Official Gazette of Romania, Part I, No.185 on February 28, 2018, para. 50.

⁹⁷ Parliament Decision no. 8/2003, published in the Official Gazette of Romania, Part I, no. 219 on April 2, 2003.

⁹⁸ Parliament Decision no. 56/2013, published in the Official Gazette of Romania, Part I, no. 588 on September 17, 2013.

pollution of water, air, and soil; and the damage to biodiversity.⁹⁹ Other identified risks concerned the archaeological and cultural heritage of the specific zone in which the project was to be developed.¹⁰⁰ The committee proposed the rejection of the law, an evaluation by the competent state authorities of the environmental risks identified in the report, and taking the necessary steps to include the historic site of Rosia Montana on UNESCO's world heritage list.¹⁰¹ Finally, taking into account the results of the report, the draft law regarding the mining operations in Roșia Montană was rejected by the Senate and then by the Chamber of Deputies with a large majority.¹⁰²

Regarding the Ombudsman (Advocate of the People), it has to be pointed out that this individual is appointed for a term of office of five years to defend natural persons' rights and freedoms, and their deputies are specialized per fields of activity.¹⁰³ The Ombudsman shall exercise their powers *ex officio* or at the request of persons aggrieved in their rights and freedoms within the limits established by law.¹⁰⁴

Acting *ex officio*, the Ombudsman questioned the Ministry of Environment, Waters, and Forests regarding Black Sea pollution. The ministry stated that "the marine ecosystem is in an ecological moment that can be assimilated with a state of convalescence, a state characterized by fragile balance, ... [it] becomes vulnerable to the persistence of anthropogenic impact, ecological accidents and the effects global climate change... There was a risk of failure to achieve good ecological status for certain descriptors, namely D5 eutrophication, D8 contaminants, and D1 biodiversity, so the natural process of restoring the health of the sea depends on the continuity and firmness of implementing measures for conservation and protection of the marine environment." Following the steps taken by the Ombudsman, the Ministry of Environment, Waters, and Forests updated the Program of Measures to Achieve Good Ecological Status of the Black Sea according to the Marine Strategy Framework Directive, which was published on March 22, 2022.¹⁰⁵

Following the notice of the European Commission to stop illegal logging, acting *ex officio*, the Ombudsman ordered an investigation of the competent authorities in the field of forestry. Following the specific steps of the investigation, it issued a Recommendation addressed to the Ministry of Environment, Waters, and Forests and published the Special Report on the Protection of Romania's Forest Areas. To comply

99 Available at: http://www.cdep.ro/comisii/rosia_montana/pdf/2014/rp520_13.pdf (in Romanian); see especially pp. 25–35.

100 *Ibid.*, p. 36.

101 This gold mining area dating back to the period of the Roman Empire was included in UNESCO's world heritage list on July 27, 2021. See <https://whc.unesco.org/en/list/1552/>. Accessed: 12 June 2022.

102 For more information, see http://www.cdep.ro/pls/proiecte/upl_pck2015.proiect?cam=2&idp=13777#%20. Accessed: 12 June 2022.

103 Article 58 para. (1) of the Constitution.

104 Article 59 para. (1) of the Constitution.

105 Dossier no. 22933/2019 <https://avp.ro/index.php/domenii-de-activitate/domeniul-drepturile-omului-egalitate-de-sanse-intre-barbati-si-femei-culte-religioase-si-minoritati-nationale/activitate/>. Accessed: 12 June 2022.

with the regulations adopted at the national and international level, in the field of environmental protection and, implicitly, of forests, the People's Advocate provided a series of recommendations for (a) streamlining the fight against illegal logging, (b) sustainable management of all categories of protected natural areas in the forestry sector, and (c) combating desertification in the context in which the south of the country has recently experienced an accelerated process of aridification.

Proposed solutions include banning clear-cut and quasi-clearing in protected natural areas and buffer zones and restricting the application of these types of forest treatments to the entire forest fund, establishing larger areas where forest treatments are not applied in all categories of protected natural areas provided for in national legislation, including Natura 2000 and UNESCO sites, developing a national strategy to control floods and afforestation, and creating a national afforestation program to implement the objective of the afforestation of land with a destination other than forestry in an area of 2 million ha by 2035.¹⁰⁶

Acting *ex officio*, the Ombudsman examined the possible violation of the right to a healthy environment and to support of the national culture, the promotion of Romania's cultural values around the world, to carry out in, a timely manner, the steps under the responsibility of public authorities for listing Roșia Montană in the UNESCO World Heritage List and the protection of this site of great cultural value. A recommendation addressed to the Minister of Culture and the Minister of Environment, Waters, and Forests was issued requesting that they take the necessary steps, based on their responsibilities, to fulfill the procedural requirements provided by the UNESCO World Heritage Convention, for the inclusion of the site in the UNESCO World Heritage List, to protect the integrity of the Roșia Montană site, which was nominated for inclusion in the UNESCO World Heritage List, and to ensure the continuity of cultural values hosted by this landscape, which dates back to Roman times and is proof of multimillennial continuity. Following the issuance of the recommendation, between July 16 and 31, 2021, the meeting of the World Heritage Committee took place, and on July 27, 2021, the Committee decided to add 13 cultural sites from around the world to the UNESCO World Heritage List, including the Roșia Montană Mining Landscape (Romania). Roșia Montană was simultaneously listed in the List of World Heritage in Danger, with the goal of removing threats to its integrity, as represented by plans to resume mining, which would damage much of the mining landscape.¹⁰⁷

Regarding the High Court of Justice and Cassation, its case law focuses on the observance of the law and the administrative acts enacted, such that its case law cannot be considered overly innovative from a constitutional perspective. Notably, in a case

106 Dossier no. 19249/2019 <https://avp.ro/index.php/domenii-de-activitate/domeniul-drepturile-omului-egalitate-de-sanse-intre-barbati-si-femei-culte-religioase-si-minoritati-nationale/activitate/>. Accessed: 12 June 2022.

107 Dossier no. 2663/2021 <https://avp.ro/index.php/domenii-de-activitate/domeniul-drepturile-omului-egalitate-de-sanse-intre-barbati-si-femei-culte-religioase-si-minoritati-nationale/activitate/>. Accessed: 12 June 2022.

concerning road construction in a protected natural area, the High Court of Justice and Cassation reviewed the observance of article 35 and article 135 para. (2) letter e) of the Constitution by the authority that issued the environmental agreement.¹⁰⁸ The Court considered that the invoked constitutional provisions were observed as an environmental agreement but also that all of the documentation that was the basis for its issuance was drawn up in compliance with the normative framework applicable in the field; the biodiversity study showed the effects of the project as well as the protection measures. The environmental agreement provided, *inter alia*, works for wildlife protection; measures to prevent, reduce, and offset significant adverse effects on the environment related to deforestation of forest vegetation and the prevention and reduction of water, soil, and subsoil pollution; reduction measures targeting the impact on biodiversity and protected natural areas; measures for the management of toxic waste and hazardous substances; measures for landscape protection; a plan for monitoring pollution sources; biodiversity monitoring, including habitat and species status; compensatory measures taken to restore and/or improve habitats in protected natural areas; and an environmental management plan, including monthly monitoring.

In this context, it should be mentioned that, according to the Constitutional Court's case law, the general courts have the power to directly apply the Constitution only in the case and terms established by the decision of unconstitutionality issued by the Constitutional Court.¹⁰⁹ Therefore, the courts can apply the Constitution directly only if the Constitutional Court has found the unconstitutionality of a legislative solution and has authorized, by that decision, the direct application of certain constitutional provisions in the absence of a legal regulation as a result of the decision of unconstitutionality.¹¹⁰ Therefore, from this perspective, the direct application of article 35 of the Constitution by the general courts is questionable. This means that in the view of the Constitutional Court, the general court can apply only the legislative acts that apply/develop/detail the aforementioned fundamental right, but it cannot apply the constitutional norm itself.

Regarding the investigation of environmental offenses, the public prosecutor's offices play a central role. In a study on criminal proceedings in the field of environmental offenses committed between 2011–2016, a solution of indictment was disposed in only four cases out of 822 cases solved by the prosecution units.¹¹¹ The au-

108 Decision no. 1670/2015, issued by the High Court of Justice and Cassation – Administrative and Fiscal Section, not published.

109 See, regarding the direct application of the Constitution, Decision no. 186/1999, published in the Official Gazette of Romania, Part I, no. 213 on May 16, 2000; Decision no. 774/2015, published in the Official Gazette of Romania, Part I, no. 8 on January 6, 2016, Decision no. 895/2015, published in the Official Gazette of Romania, Part I, no. 84 on February 4, 2016, Decision no. 24/2016, published in the Official Gazette of Romania, Part I, no. 276 on April 12, 2016, para. 34, or Decision no. 794/2016, published in the Official Gazette of Romania, Part I, no. 1029 on December 21, 2016, para. (37).

110 Constitutional Court Decision no. 377/2017, published in the Official Gazette of Romania, Part I, no. 586 on July 21, 2017.

111 Lazăr and Hosu, 2016, pp. 68–69.

thors observe that the investigations carried out by the prosecutors did not concern the major polluters or serious situations that result in significant damage to the environment (irreversible or long-term damage) or the death or severe injury of a person's physical integrity or health. Rare cases existed in which the perpetrator was a legal person.¹¹² In regard to forestry crimes, during the abovementioned period, there were 429 cases in which criminal convictions were disposed. However, the number of these types of criminal offenses remains high throughout the country, and the fight against this phenomenon is not efficient, despite the efforts of the police and forestry staff; moreover, the aggressiveness of the perpetrators is being caused by their living conditions in disadvantaged areas and by constant and secure earnings.¹¹³ The main criminal offenses in the forestry field are tree felling and tree thefts.¹¹⁴ As a general conclusion, the investigated cases are not complex, and the decisions convicting the perpetrators are oriented toward the minimum of the imprisonment punishment provided by the law; in most of the cases, the courts applied a conditional sentence that suspended the execution of the penalty. During the mentioned period, there was no investigation of a legal person with activities in the field of wood exploitation for committing a forestry offense.¹¹⁵

Parliament even enacted a law for the establishment of a Directorate for the Investigation of Environmental Crimes within the Public Ministry, in other words, a specialized prosecution unit. However, the Constitutional Court struck down the law because it approved budget expenditure – consisting in the expenditure connected with the operation of the prosecution unit – without establishing the financing source. Such an institutional behavior of the Parliament is contrary to article 138 para. (5) of the Constitution,¹¹⁶ and it has precluded this law's entry into force.

5. Assessing the constitutionality of the legislative framework in environmental issues

According to the Constitutional Court's case law, the Constitution is not a declaration of rights, as the latter is only proclamatory in nature and lacks both legal guarantees for their implementation and a coercive force in the case of their violation. Thus, the declarations of rights do not include legal norms that are mandatory for all subjects of law; rather, they are simple statements of principles, the violation of which does not trigger a state sanction in order to restore the authority of the

112 Ibid, p. 86.

113 Lazăr and Hosu, 2016, pp. 108–109.

114 Ibid, pp. 110–219.

115 Ibid, pp. 220–221.

116 Constitutional Court Decision no.681/2020 published in the Official Gazette of Romania, Part I, no. 959 on October 19, 2020.

violated rule and repair damages to legal subjects. These should not be confused with the guarantees of rights that are ensured by imperative, constitutionally enshrined legal norms. That is why a proclamatory text finds neither its place nor its rationale in the text of the Constitution.¹¹⁷

Thus, the Constitution comprises only normative rules/fundamental rights and freedoms/principles, and it is the task of the Constitutional Court to identify and develop their normative content and limits.

According to article 146 letters a) and d), the Constitutional Court has the power to adjudicate on the constitutionality of laws before the promulgation thereof upon notification by the President of Romania, one of the presidents of the two Chambers, the government, the High Court of Cassation and Justice, the Advocate of the People, or a total of at least 50 deputies or at least 25 senators as well as to decide on objections as to the unconstitutionality of laws and ordinances that are brought before courts of law or commercial arbitration. the objection as to the unconstitutionality may also be brought up directly by the Advocate of the People. Therefore, the Constitution provides for a priori and a posteriori constitutional review.

In its case law, the Constitutional Court embraced the living law doctrine, stating expressly that it “is indisputable that society is evolving, and the new political, social, economic, cultural realities have to have a normative expression, to be found in the content of positive law. The law is alive, so that, together with society, it must adapt to changes. Thus, laws are repealed, reach their time limit, amended, supplemented, suspended or simply fall into disuse, depending on new social relations, requirements and opportunities. However, all these legislative incidents and the normative solutions they enshrine must respect the principles of the Basic Law. The Constitutional Court, once notified, has the task of controlling the norm, being irrelevant that the norm criticized for unconstitutionality belongs or not to the active part of the legislation.”¹¹⁸

Moreover, in determining the normative content of the law subject to constitutional review, the Court must take into account the way in which it is interpreted in judicial practice. The interpretation of laws is a rational operation, indispensable in the process of their application and observance, with the aim of clarifying the meaning of legal norms or their field of application; in the process of resolving the cases with which they were invested, this operation is carried out necessarily by the courts by resorting to interpretive methods. The interpretation thus realized indicates to the constitutional court the meaning of the legal norm subject to the constitutionality control, objectifying it and circumscribing its normative content. To achieve this purpose, the interpretation given to legal norms must be generally accepted. This can be done either by the High Court of Cassation and Justice by way

117 Constitutional Court Decision no.80/2014, published in the Official Gazette of Romania, Part I, no. 246 on April 7, 2014, para. 54–55.

118 Constitutional Court Decision no. 766/2011, published in the Official Gazette of Romania, Part I, no. 549 on August 3, 2011.

of preliminary rulings or when resolving appeals in the interest of the law or by a constant judicial practice. Constitutional review concerns the normative content of the legal norm, as it is established by a general and continuous interpretation at the level of courts and cannot be performed on the content of the legal norm resulting from erroneous and isolated interpretations of some courts. Therefore, the review of constitutionality may concern the norm as it is interpreted continuously by constant judicial practice, by preliminary rulings, and by decisions rendered in appeals in the interest of the law when they contravene the provisions of the Basic Law. However, the jurisdiction of the Constitutional Court is also exercised when there is a divergent and continuous judicial practice that is not isolated and in which one of the interpretations given to the norm in question is contrary to the requirements of the Constitution. In other words, the fundamental criterion for determining the competence of the Constitutional Court to exercise constitutionality control over an interpretation of the legal norm is the continuous character of this interpretation, specifically its persistence in time, within the judicial practice and, therefore, the existence of a judicial practice that indicates a certain degree of acceptance at the court level. Thus, the Court is empowered to intervene when it is notified of the existence of a unitary/non-unitary practice of interpretation and application of the law that could violate the requirements of the Constitution, while isolated interpretations that are obviously erroneous cannot be subject to constitutional review but are of judicial control.¹¹⁹

When performing a proportionality test, the Constitutional Court operates with aspects that go beyond the strict normative sense of the law. If the Court notes state interference in a specific fundamental right, it will assess the pursued aim and whether it is legitimate, and then it performs the *stricto sensu* proportionality test, namely whether the measure is suitable, necessary, and respects a fair balance between the concurrent interests at stake (the individual and the public).¹²⁰ Article 53 provides *expressis verbis* for the possibility of restricting the exercise of certain rights or freedoms and adds a condition of proportionality of the restriction. In its case law, the Court notes that the normative scope of this constitutional text refers to situations that deviate from the natural course of political, economic, and social life, its application intrinsically implying an exceptional character of the circumstances in which the analyzed legal norm is adopted. Therefore, the provisions of article 53 of the Constitution are not applicable *rationae materiae* when reviewing the constitutionality of a framework norm with a generally valid configuration.¹²¹ That is why the Court applies the proportionality test as a typical method to determine

119 Constitutional Court Decision no.276/2016, published in the Official Gazette of Romania, Part I, no. 572 on July 28, 2016.

120 The first decision in which the Romanian Constitutional Court performed the proportionality test was Decision no.266/2013, published in the Official Gazette of Romania, Part I, no. 443 on July 19, 2013.

121 Constitutional Court Decision no. 851/2021, published in the Official Gazette of Romania, Part I, no. 454 on May 6, 2022.

the content and limits of the fundamental right at stake and only exceptionally use it within the meaning of article 53 of the Constitution – that is, only in exceptional factual situations.¹²²

In the environmental field, the Constitutional Court performed a proportionality test in a case concerning the interdiction of the meadows' owners to change their category of use.¹²³ Analyzing the purpose pursued by the Parliament by adopting this measure, the Court has found that it aims, on the one hand, to regulate the organization, administration, and operation of permanent pastures in accordance with the provisions of Regulation (EC) no. Council Regulation (EC) No 73/2009 of January 19, 2009, and, on the other hand, to ensure the maintenance, upkeep and use of the land to preserve the floristic composition of the meadows – which is a gain for the quality of the environment – as well as the creation of economically viable farms and the support of farmers in the development of a short- and medium-term business plan and development program adapted to market requirements. The Court thus has found that these objectives are legitimate. The obligation to maintain the land as meadow represents an adequate and necessary measure for the fulfillment of the aforementioned legitimate purpose. The Court has found that the law strikes the right balance between measures that have limited the use of property as an attribute of ownership and the legitimate aim pursued, as there is a reasonable relationship of proportionality between the competing interests of the community and the individual. The measure in question ensures both the protection of the interests of the community regarding the preservation of the phytocenosis specific to the meadows – and, therefore, of a component part of the national ecosystem – and the possibility of the owner of the property's right to use the meadows according to their nature and typology.

In its case law, the Constitutional Court reviewed the constitutionality of forestry crimes. Its review concerns the observance of article 23 para. (12) of the Constitution,¹²⁴ such that the incrimination of certain facts by legal norms of criminal law must respect the principle of proportionality of the incrimination, according to which the incrimination must be strictly necessary to the objective pursued by the legislator, and the intrusion into the fundamental rights restricted by the application of the incriminating rule must be justified.¹²⁵ In this jurisprudential context, the Court noted that the social values protected by the incrimination of forestry crimes consist in the social relations meant to protect the forest fund as an essential factor in maintaining the quality of the environment at an optimal level. The state is primarily responsible for achieving the principles of the continuity of timber harvests,

122 For a detailed picture on this issue, see Pivniceru and Benke, 2015, pp.73–93.

123 Constitutional Court Decision nr. 13/2015, published in the Official Gazette of Romania, Part I, no. 175 on March 13, 2015, para. 28–30.

124 According to this constitutional provision, “Penalties shall be established or applied only in accordance with and on the grounds of the law.”

125 Constitutional Court Decision no. 418/2018, published in the Official Gazette of Romania, Part I, no. 625 on July 19, 2018, para. 30.

functional efficiency, and ensuring the conservation and improvement of biodiversity, which is likely to legitimize its quality as the main passive subject of such crimes. All of these principles are clear reasons that justify the material and moral interest of the Romanian state in taking all necessary steps to ensure the protection of forest vegetation from uncontrolled acts of cutting, breaking, destroying, degrading, or uprooting trees, seedlings, or shoots belonging to this fund.¹²⁶

Concerning the legal norms that allow the building of the elements of physical infrastructure necessary to support electronic communications networks in urban green spaces if they do not exceed 50 m² and 10% of the total area of the respective parcel of green space – 5G networks – the Constitutional Court noted that it pursues a legitimate aim, namely to facilitate the development of electronic communications networks, and that it responds to the need for electronic communication of individuals and legal entities as well as the need to create high-performance infrastructure adapted to technological developments. However, such a measure has a significant negative impact on sustainable development and ecological balance in urban communities, and it appears to be inadequate and even excessive. The Court considers that the criticized legislative solution is not necessary for the pursued aim, as it can be achieved in a way other than that which violates fundamental rights. Finally, regarding the fair balance among the specific interests of the beneficiaries of the law, the Court emphasized that, in applying the principle of proportionality in matters of legislation, the legislator is bound by a condition of reasonableness, namely not to call into question the very existence of rights, or, by the measure provided, the legislator violated this condition of reasonableness, as the criticized provisions have a legal effect of the production of an imbalance between the general public interest represented by the need to develop electronic communications networks and individual interests regarding the right to healthcare and to a healthy environment.¹²⁷ Therefore, the Constitutional Court is very protective regarding these two fundamental rights as once they are affected, the provoked damage is irreparable.

Analyzing the constitutionality of a legal norm that concerned the payment of a fee by the natural or legal person entrusting for final disposal of municipal, construction, and demolition waste, the Constitutional Court established the aim pursued by the legislator, namely to align the Romanian legislation with the European legislation in the field of waste management and to implement some very important economic instruments for the modernization of waste management in Romania. Thus, the economic instruments that were implemented in the national legislation were “pay for what you throw away” “extended producer responsibility” and storage tax. To implement the economic instruments “pay for what you throw away” and “extended producer responsibility” it was necessary to amend and supplement the relevant legislation so as to clearly establish the responsibilities and obligations

126 Constitutional Court Decision no. 755/2012, published in the Official Gazette of Romania, Part I, no. 717 on October 22, 2012.

127 Constitutional Court Decision no. 295/2022, para.180.

of all parties involved, including changes made by promoting the circular economy package. The Constitutional Court emphasized that this landfill tax is a tool used in all European Union countries to reduce the amount of recyclable waste.¹²⁸

However, regarding facts or shortcomings in the legislation, the Constitutional Court is no longer competent to decide on the issue at hand. For example, the absence of the obligation of specialized and authorized economic agents to take over and recover industrial waste and the absence of a legal procedure regarding the publicity of this category of economic agents do not concern the constitutionality of the norm; thus, these aspects cannot be examined by the Constitutional Court.¹²⁹ Likewise, the aspects presented regarding the factual situation in the case cannot be retained, as they do not fall within the competence of the Constitutional Court.¹³⁰

The legislator may impose on economic operators that pollute the environment the payment of a tax/contribution to the Environmental Fund, as such a regulation is an approach to fulfilling the positive obligation of the Romanian state to ensure an adequate legal framework for exercising the right of any person to a healthy and ecologically balanced environment, with both individuals and legal entities having the duty to protect and improve the environment.¹³¹

The positive obligation of the Romanian state to ensure an adequate legislative framework for the exercise of the right to a healthy environment is achieved by taxing motor vehicles for the pollution they produce based on certain criteria. The Court noted that the polluter pays principle is not of constitutional rank, but, taking into account the principle of fiscal equity, such a tax must be paid by the polluter.¹³² Instituting such an environmental tax, the state fulfilled its obligation enshrined in article 35 para. (1) and (2) of the Constitution, according to which it provides the legislative framework for exercising the right of any person to a healthy and ecologically balanced environment, as this tax was established for environmental protection and air quality improvement as well as for compliance with limit values provided for in Community legislation in this field. Moreover, from a fiscal perspective, such a tax is the expression, at the legal level, of the constitutional norm of article 35 para. (3),

128 Constitutional Court Decision no. 897/2020, published in the Official Gazette of Romania, Part I, no. 335 on April 1, 2021, para. 20–21, and Constitutional Court Decision no. 95/2021, published in the Official Gazette of Romania, Part I, no. 642 on June 30, 2021, para. 24–25.

129 However, when the legal gaps have constitutional relevance, the Court considers that it is competent to examine the constitutionality of the norm (specifically, the omission of the norm). The assessing of the constitutional relevance of the gap implies two objective criteria: (a) a specific constitutional provision that imposes a certain obligation/right/competence and (b) that specific obligation is not enacted in the legislative act; see, for example, Decision no. 503/2010, published in the Official Gazette of Romania, Part I, no. 353 on May 28, 2010.

130 Decision no. 506/2004, published in the Official Gazette of Romania, Part I, no. 68 on January 20, 2005.

131 Decision no. 485/2017, published in the Official Gazette of Romania, Part I, no. 783 on October 3, 2017, para. 23, and Decision no. 268/2017, published in the Official Gazette of Romania, Part I, no. 629 on August 2, 2017, para. 17.

132 Decision no. 802/2009, published in the Official Gazette of Romania, Part I, no. 428 on June 23, 2009.

according to which “Natural and legal persons have the duty to protect and improve the environment.”¹³³

Activities with a possible significant impact on the environment can take place only on the basis of the environmental permit and the integrated environmental permit that have been regulated in consideration of the provisions of article 35 para. (2) of the Fundamental Law, which establishes the obligation of the state to ensure the legislative framework for the exercise of the right to a healthy and ecologically balanced environment, recognized for any person via the provisions of para. (1) of the same article.¹³⁴

Restrictive regulation of the areas in which smoking is allowed is an option of the legislator that gives expression to the constitutional provisions that guarantee the right to life and the right of a person to physical and mental integrity [article 22 para. (1)], the right to healthcare while establishing the obligation of the state to take measures to ensure hygiene and public health [article 34 para. (1) and (2)], the right of any person to a healthy and ecologically balanced environment, namely the obligation of the state to ensure the legislative framework for the exercise of this right [article 35 para. (1) and (2)], and the right of children and young people to a special regime of protection and assistance in the realization of their rights [article 49 para. (1)]. These constitutional provisions impose on the state a series of positive obligations, which presuppose adequate legislative measures for their fulfillment, in respect of which the legislator has a wide margin of appreciation, for the protection of citizens’ constitutional rights, regardless of whether they are smokers or non-smokers.¹³⁵

Neither the Constitution nor the Constitutional Court’s case law provide for a non-derogation or precautionary principle as part of the normative part of the right to a healthy environment, but when performing the proportionality test, the Constitutional Court is highly deferent if the limitation of a certain fundamental right or freedom is justified by considerations regarding the right to a healthy environment. Even if the two aforementioned principles do not appear in the case law or Constitution, the Constitutional Court has a highly cautious approach when it comes to nature/the environment and the presentation of its decisions contains – implicitly at a minimum – the precautionary principle.¹³⁶

Moreover, according to article 20 para. (1) of the Constitution, constitutional provisions concerning the citizens’ rights and liberties shall be interpreted and enforced in conformity with the Universal Declaration of Human Rights considering

133 Decision no. 487/2014, published in the Official Gazette of Romania, Part I, no. 901 on December 11, 2014, para. 28.

134 Decision no. 92/2015, published in the Official Gazette of Romania, Part I, no. 318 on May 11, 2015, para. 14, Decision no. 774/2014, published in the Official Gazette of Romania, Part I, no. 124 on February 18, 2015, para. 19.

135 Decision no. 29/2016, published in the Official Gazette of Romania, Part I, no. 196 on March 16, 2016, para. 28.

136 See especially Decision no. 295/2022, para. (181).

the covenants and other treaties to which Romania is a party. Therefore, even if these principles are neither enshrined in the Constitution nor developed – yet – in the Constitutional Court’s case law, if a certain environmental issue were to raise a problem related to these principles, the Court can interpret article 35 in consideration of the Rio Declaration.¹³⁷ Additionally, considering that in the Tătar case, the ECHR itself used the precautionary principle when assessing the conduct of the state vis-à-vis article 8 of the Convention, the Constitutional Court will likely eventually use this principle in its jurisprudence.

6. The relationship between the right to a healthy environment and other fundamental rights/liberties

6.1. Human dignity

According to the Constitutional Court’s case law, human dignity is a guiding principle of the fundamental rights and freedoms and of the guarantees associated with them, as their source; at the same time, it is a distinct fundamental right.¹³⁸ Any violation of fundamental rights and freedoms is a violation of human dignity, given that their basis constitutes a mediated violation of human dignity and that because human dignity can be considered fundamental with distinct normative value, the possibility of its direct violation must be accepted, distinct from the fundamental rights and freedoms provided for in the Constitution.¹³⁹

From a constitutional perspective, human dignity presupposes two inherent dimensions, namely human relations, which concern the right and obligation of human beings to be respected and, in correlation, to respect the fundamental rights and

137 See, for example, Decision no. 64/2015, published in the Official Gazette of Romania, Part I, no. 286 on April 28, 2015, para. 23–28. In this decision, the Court extensively interpreted the normative content of article 41 of the Constitution (Labor and the social protection of labor) in light of the European Social Charter, making use by article 20 para.1 of the Constitution. The Court stated that by establishing the obligation to interpret the rights and freedoms of citizens in accordance with the international treaties to which Romania is a party, the constituent legislator implicitly imposed a level of constitutional protection of fundamental rights and freedoms at the level provided in international acts at a minimum. In this context, the regulation of a measure of social protection of labor in an international treaty, corroborated by its importance and social amplitude, results in conferring the right or freedom provided in the Constitution on an interpretation in accordance with the international treaty, in other words, an interpretation that evolves the evolutionary concept of the constitution – see, especially, para. 23 of the decision.

138 Decision no. 464/2019, published in the Official Gazette of Romania, Part I, no. 646 on August 5, 2019, para. (31) and (52).

139 Ibid, para. (48).

freedoms of their fellow human beings,¹⁴⁰ and human beings' relationship with the environment, including the animal world, which implies a moral responsibility of care for these beings in a way that illustrates the level of civilization attained.¹⁴¹ Animals can be seen as an integral part of a sustainable and ecologically balanced environment, their protection being incorporated into the wider framework of ensuring the conditions for maintaining a healthy nature, which will benefit both present and future generations.¹⁴²

6.2. *Right to property*

Once the right to a healthy environment becomes a fundamental right, its relationship to other enacted constitutional provisions must be determined. In this equation, the most relevant relationship is with the right of property, as article 44 of the Constitution that concerns private property makes an express reference to its exercise with the observance of duties relating to environmental protection. Article 555 para. (1) of the Civil Code defines private property as “the right of the owner to own, use and dispose of an asset exclusively, absolutely and perpetually, within the limits established by law.” The reference to “absolutely” in the legal text raised difficulties in qualifying the aforementioned right as absolute or relative. In its case law, the Constitutional Court pointed out that the right to property provided by article 44 of the Constitution is not an absolute right. According to para. (1) of article 44 of the Constitution, “The content and limits of these rights (property rights and claims on the state) are established by law”, which allows the legislator, in consideration of specific interests, to establish rules that harmonize the incidence and other fundamental rights of citizens other than property rights in a systematic interpretation of the Constitution, such that they are not suppressed by the approach to regulating property rights. As a consequence, a law that bans a change of the destination of the lands arranged as green spaces and/or provided as such in the urban planning documents, the reduction of their surfaces or their relocation is limiting the right of property; however, it has a social and moral justification, considering that the strict observance of these norms represents a major objective, the protection of the environment and, therefore, of the existing green space, which has a direct connection with the level of public health, thus constituting a value of national interest.¹⁴³

A provision of a law that establishes an obligation on all natural and legal persons to refrain from any activities likely to cause degradation to the natural or

140 See, in this regard, Decision no. 62/2007, published in the Official Gazette of Romania, Part I, no. 104 on February 12, 2007.

141 Decision no. 1/2012, published in the Official Gazette of Romania, Part I, no. 53 on January 23, 2012.

142 Decision no. 511/2017, para. (14).

143 Decision no. 824/2008, published in the Official Gazette of Romania, Part I, no. 587 on August 5, 2008, or Decision no. 1416/2008, published in the Official Gazette of Romania, Part I, no. 77 on February 10, 2009.

landscaped environment, through uncontrolled storage of waste of any kind was rendered constitutional. The Constitutional Court noted that in this specific way, the legislative act ensures a healthy environment even if the owner of the property rights experiences a restriction in the exercise of the attributes of their rights. The legislator is, therefore, competent to establish the legal framework for the exercise of the attributes of the property rights under the primary meaning conferred by the Constitution, so as not to conflict with the general or legitimate interests of other subjects of law, thus establishing reasonable limitations in its use as a guaranteed subjective right. In this respect, the Court has found that the legislator did nothing but express these imperatives within the limits and according to its constitutional competence.¹⁴⁴

Concerning the ownership of forests – which constitute a good under the meaning of article 1 of Protocol no. 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms – the Constitutional Court stated that it is subject to strict state regulation.¹⁴⁵ In the specific case analyzed by the Court, the authors of the exception of unconstitutionality were dissatisfied with the fact that they were fined and forced to pay 50% of the value of the damages produced in the forest they own as a result of non-compliance with the legal provisions regarding the forest regime, specifically due to non-compliance with the obligation to ensure the management of the forest/forestry services (guarding the forest against illegal logging, theft, destruction, degradation, grazing, and other acts detrimental to the forest fund) established under the law. However, the Court noted that such regulation is justified as it is proportionate to the legitimate aim pursued, namely to ensure the sustainable management of forests, whereby on the one hand, the legislator wanted, on the one hand, the owner to continue the forestry policy issued before the possession or forest lands by natural and legal persons based on land laws, respectively the execution of technical forestry works according to forestry arrangements and regulations imposed by the forestry regime and, on the other hand, to ensure the legal framework for carrying out tasks related to environmental protection. As such, the measures established by the legal provisions do not amount to a “duty” related to environmental protection are obligations imposed on the owner in consideration of the property to ensure the sustainable management of forests/the forest fund. Therefore, in relation to the legitimate aim pursued, the Court found that the special regime for the regulation of the attribute of use, including the obligation of the owners to conclude the contracting of administration/forestry services, is adequate, necessary, and proportionate and respects a fair balance between the general interests of the society and the specific interests of the holders of the property rights.

144 Decision no. 68/2004, published in the Official Gazette of Romania, Part I, no. 206 on March 9, 2004.

145 In Decision no. 158/2000, published in the Official Gazette of Romania, Part I, no.566 on November 15, 2000, the Court pointed out that the ownership of forests can only be exercised in compliance with the Forest Code, which determines its content and limits.

One law imposes the obligation of the owners of the lands allocated to a hunting fund to allow the exercise of hunting, the application of hunting protection measures, and the location of temporary hunting facilities and arrangements provided that the respective actions do not affect the basic use of those lands. Even if, through this, the holder of the property rights suffers a restriction of the exercise of the attributes of their rights, the legal regulation itself does not reveal any contradiction to the fundamental right to private property because, on the one hand, capitalization of the hunting fund – a public good of national interest and, at the same time, a renewable natural resource of international interest – is ensured, and, on the other hand, setting the content and limits of property rights is the exclusive attribute of the legislator.¹⁴⁶ The hunting fund is represented by the hunting management unit consisting of the fauna of hunting interest and the land area, irrespective of its category, regardless of the owner and delimited so as to ensure the highest possible stability of the fauna of hunting interest within it. The exceptions are urban areas and the strictly protected area and buffer zone of the Danube Delta Biosphere Reserve. Fauna of hunting interest, which consists of all specimens from the populations of wildlife species existing in the territory of Romania, represents a renewable natural resource and a public good of national and international interest. Thus, the fauna of hunting interest represents a different element from the land surfaces on which it can be found, the two elements being interdependent and only together forming a hunting-related element. The area of land that forms part of a hunting fund remains the property of the natural or legal person who owned it until its establishment.¹⁴⁷

In another case, the Constitutional Court had to analyze the constitutionality of a law that provided for the carrying out of the deratization activity on private property only by the operator that concluded such an agreement with the local authorities. Private persons that attacked the constitutionality of the norm considered that if they had no possibility of selecting another operator on the criteria of supply and demand or report quality/price, specific to the market economy, their right to private property, more precisely to the *usus* attribute, is infringed upon because the state or another unit of public law can dispose only with regard to public property and not to private property. The Court stated that such a provision of law is meant to ensure the effective realization of the sanitation of such localities beyond the will of each individual. As it is a service of public interest, leaving it to the discretion of the individual and thus endangering public health, a value protected at the constitutional level by article 35 (the right to a healthy environment), would be inadmissible.¹⁴⁸ Such a legal norm is justified by the fact that the sanitation of localities has the legal nature of a public service and is carried out in the interest of the entire local

146 Decision no. 345/2003, published in the Official Gazette of Romania, Part I, no.746 on October 24, 2003.

147 Decision no. 295/2016, published in the Official Gazette of Romania, Part I, no. 616 on August 11, 2016.

148 Decision no. 612/2009, published in the Official Gazette of Romania, Part I, no. 391 on June 10, 2009.

community, and therefore, it is developed only by licensed operators under the special law, respecting the principles of public health and the conservation and protection of the environment. Moreover, the distinction between the collection of waste stored on private property and waste stored in public spaces is irrelevant because the nature of “public sanitation service” takes into account the public interest of a certain community, namely the satisfaction of the needs of local sanitation communities, and is thus within the scope of the community services provided by public utilities, regardless of the origin of the waste or the place of storage.¹⁴⁹

The right to property does not confer to its holder a right to build in any condition. The law specifies the conditions under which the execution of construction work must take place, establishing as the responsibility of the holder – of land and/or construction certain obligations deriving from the need to protect the general interest that urbanism and landscaping, as well as security and safety in construction represent. The Court noted that the obligation to obtain a building permit and to prosecute those who do not comply with this obligation protects the rights and freedoms of others, and the activity of building or demolishing buildings of any type must be subject to the conditions prescribed by the law. It was also noted that the obligation to obtain a building permit aims to prevent negative consequences in the case of improper construction; therefore, fulfilling this obligation is intended to prevent the consequences of accidents in the case of improper construction, which justifies the restrictive regulation by Law no. 50/1991 of the authorization for the execution of construction work. Thus, the location, design, execution, and operation of buildings are operations that must comply with urban planning and landscaping as well as certain quality and safety standards. Moreover, the Court emphasized that the aim of the normative acts that establish the quality system in construction is to protect people’s lives, property, society, and the environment as well as to prevent negative consequences in the case of construction in breach of applicable law. However, at the same time, the legislator a wide margin of appreciation to criminalize or de-criminalize the actions that breach the authorization conditions provided by the law. For example, the Court accepted the de-criminalization of certain breaches to the regime of the execution of construction work,¹⁵⁰ stating that the legislator took into account the fact that they present a lower social danger, with less harmful consequences for the protected social values. From this perspective, as long as the Parliament

149 Decision no. 358/2021, published in the Official Gazette of Romania, Part I, no. 736 on July 27, 2021.

150 Construction, reconstruction, modification, extension, repair, modernization, and rehabilitation work on roads of any type, forest roads, works of art, networks and technical-municipal equipment, connections to utility networks, hydrotechnical work, riverbed arrangements, land improvement work, infrastructure installation work, work for new capacities of the production, transport, and distribution of electricity and/or heat as well as rehabilitation and refurbishment of existing capacities, drilling and excavation work required for geotechnical studies and geological surveys, and the design and opening of quarry and ballast mines, gas and oil wells, and other surface, underground, or underwater mining.

considers the social danger of a certain act to be greater than that of another one, it will qualify them and, implicitly, will always sanction them differently. Otherwise, it would mean that we would no longer have distinct criminal and administrative offenses, but there would be a single institution for all acts considered “antisocial”.¹⁵¹

The right to property, as with any other right, must be exercised in good faith and in accordance with the interests and rights of other rightsholders or the general interest of a particular company or community. In this regard, the Court noted that the legal norms regarding land use planning and urbanism, regulated by Law no. 350/2001, aim precisely to obtain a reasonable balance between the specific interests of the owners of the property rights and the public interest that consists in protecting the environment and ensuring the right to a healthy environment as guaranteed by article 35 of the Constitution. To avoid abuses in the field of construction, with extremely serious consequences for the goal of harmonization of the urban environment with the protection of the natural environment, the law contains certain rules on the building permit regime, which were developed according to the nature, purpose, and social impact of each type of construction. Compliance with these rules cannot be converted into an alleged restriction on the exercise of property rights.¹⁵² A new stricter regulation on land use planning and urbanism was necessary to drastically reduce the practices of derogatory urbanism, practices which have led to a process of incoherent internal transformation of localities and uncontrolled expansion that has caused dysfunctions and costs that were sometimes unbearable for local communities, the occupation and dismantling of green spaces, which has generated serious environmental problems, and an avalanche of disputed situations that have affected the legal security of investments.¹⁵³

In conclusion, the Constitutional Court must find a fair balance between the two competing fundamental rights. As R. Alexy noted, the principle of proportionality consists of three sub-principles: the principles of suitability, of necessity, and of proportionality in the narrow sense. All three principles express the idea of optimization. Balancing is the subject of the third sub-principle of the principle of proportionality, the principle of proportionality in the narrow sense. This principle expresses the idea of the “Law of balancing” which has three stages. The first stage is a matter of establishing the degree of nonsatisfaction of or detriment to the first fundamental right at stake, the second stage establishes the importance of satisfying the competing fundamental right, and the third stage answers the question of whether the importance of satisfying the competing fundamental right justifies the detriment to, or non-satisfaction of, the first.¹⁵⁴ Therefore, the Constitutional Court has the

151 Decision no. 142/2019, published in the Official Gazette of Romania, Part I, no. 356 on May 8, 2019, para. 41, 43, 55.

152 Decision no. 734/2019, published in the Official Gazette of Romania, Part I, no. 133 on February 19, 2019, para. (18).

153 Decision no. 286/2014, published in the Official Gazette of Romania, Part I, no. 569 on July 31, 2014, para. (20).

154 Alexy, 2003, pp. 135–136.

paramount task to apply the law of balancing. At the same time, environmental aims pursued by a certain legal norm give precedence to the fundamental right to a healthy environment in relation to the right to property.

6.3. State's obligations in the environmental field

Article 35 of the Constitution should be read in conjunction with article 135 para. (2) letters d)–f) of the Constitution¹⁵⁵ as they provide for correlative obligations of the state to the right to a healthy environment.¹⁵⁶ The fundamental right in question has not only substantive but procedural content because of the state obligation to secure environmental protection and recovery as well as the preservation of ecological balance. As mentioned in Section 1, the state's obligations in environmental matters are guarantees of the right to a healthy environment.

In analyzing the Constitutional Court case law, we can identify a case concerning the constitutionality of imposing a harvesting quota of migratory birds per hunter, in which the Court noted that, in accordance with the State's obligation to maintain the population of migratory bird species "at a satisfactory level" the legislature provided separate harvest/day/hunter quotas for each species, taking into account the population trend of these species presented in the International Union for the Conservation of Nature's studies and in its inventory published in the "Red List". Parliament's option in this respect is the result of an evaluation regarding the appropriateness of the legislative measure adopted, within the margin of appreciation provided by article 61 para. (1) of the Constitution. The Constitutional Court noted that setting, by law, the harvest quota of migratory bird species as representing the maximum number of birds that can be hunted in one day by a hunter of the bird species qualified for hunting does not affect article 35 or article 135 para. (2) letters d) and e) of the Constitution.¹⁵⁷

Regarding state obligations in environmental issues, the Constitutional Court emphasized that the constitutional obligations of the state thus include the preservation of biodiversity as an integral part of the ecological balance and the sustainable exploitation of natural resources in accordance with the national interest in ensuring a healthy natural environment.¹⁵⁸ The preservation of sufficient diversity is essential for the conservation of all species of birds; therefore, special conservation measures must be provided for certain species of birds in respect of their habitats to ensure their survival and reproduction in the range. Such measures must also take into account migratory species and must be coordinated to establish a coherent framework.¹⁵⁹

155 Decision no. 54/2022, para. (63).

156 Decision no. 313/2018, published in the Official Gazette of Romania, Part I, no. 543 of 29 June 2018, para. (30).

157 Ibid, para. (74) and (75).

158 Ibid, para. (58).

159 Ibid, para. (68).

In the same decision, the Constitutional Court pointed out that even if a legal norm is clear, precise, and foreseeable in its intrinsic construction, its effects/impact on the environment can be unforeseeable at the time of its adoption. Thus, the Constitutional Court remarked that the application of a hunting law can generate unpredictable consequences on the number of game species over time. Therefore, the national legislator has the obligation to set a series of limitations on the mode of hunting exploitation of the hunting fund, such as the regulation of the species for which hunting is allowed, hunting periods/seasons or harvest quotas, and allowing each state to have its own approach regarding the various game species in accordance with the relevant European legislation providing for “the maintenance of the population of those species at a satisfactory level.” All of these limitations and, therefore, the harvest quota, regardless of how it is established, are meant to ensure the predictability of the impact of hunting on the number of hunted species, expressing the mandatory preventive character inherent in any measure of environmental protection and the sustainable use of biodiversity.¹⁶⁰

Finally, it must be noted that the Constitutional Court gives great importance to the qualification of the personnel involved in environmental issues, and the level of their knowledge in this field is considered part of the state’s obligation to protect the environment. That is why, according to case law, the period of the internship for the preparation of the candidate for obtaining a permanent hunting permit falls within the ambit of article 35 and article 135 para. (2) letter e) of the Constitution.¹⁶¹

The Constitutional Court noted that even when the legislator adopts legislative measures in favor of economic interests, it is obliged to legislate in consideration of the prevalence of environmental protection and maintaining the ecological balance.¹⁶²

6.4. Right to protection of health

Article 34 of the Romanian Constitution guarantees the right to the protection of health, and despite that it does not contain reference to environmental obligations, a direct link between a healthy environment and a healthy person cannot be denied. As a healthy environment provides the framework for individuals’ harmonious development, it presupposes the possibility of the full exercise of other fundamental rights of the person, such as the right to healthcare, enshrined in article 34 of the Constitution.¹⁶³

The Constitutional Court ruled that a quality environment also involves healthy wildlife, as the animals’ health problems can affect human health and safety. Therefore, concern for animal health reflects the human right to healthcare guaranteed at the constitutional level by the provisions of article 34, which establishes

¹⁶⁰ Ibid, para (66) and (72).

¹⁶¹ Ibid, para. (77) and (82).

¹⁶² Decision no. 295/2022, para. (173).

¹⁶³ Ibid, para. (173).

the obligation of the state to take measures to ensure hygiene and public health. Improper treatment of animal diseases that are communicable to humans, potential health problems among the population from the consumption of products from sick animals, and those who have been irrationally administered certain drugs are among the risks that can be avoided by only allowing veterinarians specializing in the products mentioned in the criticized text of the law to sell them.¹⁶⁴

According to Constitutional Court case law, the activities performed exclusively by veterinarians, such as the sale and use of organic products, pesticides, and veterinary medicinal products, fall within the ambit of articles 34 and 35 of the Constitution.¹⁶⁵

6.5. Economic freedom

Article 45 of the Constitution guarantees the free access of persons to economic activity, free enterprise, and their exercise under the conditions prescribed by law. It contains no reference to environmental obligations; however, when it refers to their exercise under the conditions prescribed by the law, the legislator has the constitutional obligation to ensure a fair balance between article 45 and article 35 read in conjunction with article 135 para. (2) letters d) and e).

For example, the Constitutional Court had to rule on the constitutionality of a legal norm that provided for an exception to the general rule enshrined in the legislation in force concerning the change of the boundaries of protected natural areas of national interest. According to the challenged norm, the state withdrew from the protected natural areas those lands affected by concession licenses approved until June 29, 2007 (the date of the entry into force of Government Emergency Ordinance no. 57/2007) by government decision for the exploitation of non-renewable mineral resources based on the mining legislation in force. The Constitutional Court stated that this provision sets the regulatory framework that considers, on the one hand, the right of every person to a healthy and ecologically balanced environment and,

¹⁶⁴ Decision no. 511/2017, para. (15).

¹⁶⁵ The activities that the Parliament places within the exclusive competence of veterinarians are of special importance as they have a direct impact on animal health and an indirect impact on human health. In view of these values, which are intended to be protected, the carrying out of the activities provided by law as within the competence of veterinarians requires special theoretical and practical training, that can be proven with the diploma issued by a higher education institution. Completion of academic studies in veterinary medicine (university education conducted over the course of 6 years) is a requirement for the acquisition of specialized knowledge that defines a genuine professional who is able to act responsibly and competently to prevent, combat, and cure animal diseases. Establishing by law the exclusivity of the veterinarian in the field of marketing and the use of biological products, antiparasitics for special use, and veterinary drugs gives professionalism to the veterinary act and avoids the risk that a person with no specialized training to exercise the skills of a strictly specialized profession. Such an inappropriate exercise of a profession would lead to the dangerous consequence of possibly committing mistakes that could negatively affect the health of animals and people, too. See Decision no. 511/2017, para. 16.

on the other, free access of the person to economic activity as well as free initiative under the conditions established by law. The Constitutional Court observed that the law provides for restrictive conditions for carrying out the exploitation of natural resources in protected natural areas, taking into account that this field of activity is a regulated one and is subject to state authorization and thus controlled by the public authority. The measure can ensure a fair balance between the requirements of the general interest regarding the right to a healthy environment and those of the private interest of economic operators who have leased land for their mining exploitation and meet the requirements regarding the adequacy and necessity of the pursued purpose.¹⁶⁶

The right to economic freedom must be understood in conjunction with respect for other fundamental rights and freedoms, such as the right to life and the right to health and a healthy environment. The prohibition of smoking in enclosed public spaces does not, in itself, constitute a restriction on economic freedom; however, it is a condition for the pursuit of economic activities with the observance of the aforementioned rights.¹⁶⁷

6.6. Access to justice and the right to information

Article 21 para. (1) and (2) of the Constitution provides the following:

“(1) Every person is entitled to bring cases before the courts for the defense of his legitimate rights, liberties and interests. (2) The exercise of this right shall not be restricted by any law.”

According to article 31 para. (1) and (2) of the Constitution, a person’s right of access to any information of public interest shall not be restricted. According to their competence, public authorities are legally bound to provide correct information to citizens regarding public affairs and matters of personal interest.

The right to access to justice and the right to information do not expressly reference environmental issues. However, in a decision,¹⁶⁸ the Constitutional Court observes that the Environmental Protection Law, which regulates the principles and strategic elements underlying the sustainable development of society through environmental protection, lists the following principles: the prevention of ecological risks and damage, priority removal of pollutants that directly and seriously endanger human health, maintenance, improvement of the quality of the environment and the reconstruction of damaged areas, and the creation of a framework for the participation of non-governmental organizations and the population in the elaboration and implementation of decisions. The Court notes that the provisions of this law are in accordance with the relevant international regulations, namely the Convention on Access to

¹⁶⁶ Decision no. 313/2018, para. 25–27.

¹⁶⁷ Decision no. 29/2016, published in the Official Gazette of Romania, Part I, no. 196 on March 16, 2016, para. (31).

¹⁶⁸ Decision no. 7/2001, published in the Official Gazette of Romania, Part I, no. 109 on March 5, 2001.

Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters. It emphasizes that the convention, which focuses on decision-making awareness, transparency, and public participation in decision-making, regulates the following: public participation in decisions on specific activities; public participation in the preparation of environmental plans, programs, and policies; and access to justice for the public concerned. In this indirect link to the right to justice and the right to information, we can deduce that there is an implicit connection between them.

6.7. Right to a healthy environment and European law

In the Constitutional Court's case law, "the use of an EU norm in the context of the review of constitutionality as an interposed norm to the reference one implies, pursuant to Article 148 para. (2) and (4) of the Constitution of Romania, a cumulative conditionality: on the one hand, that norm must sufficiently clear; precise and unequivocal in itself or its meaning must have been determined in a clear, precise and unequivocal manner by the Court of Justice of the European Union and, on the other hand, the norm must be limited to a certain level of constitutional relevance, so that its normative content may support the possible infringement by national law of the Constitution – the only direct norm of reference in the context of constitutional review."¹⁶⁹ Therefore, the contradiction between the national and the EU norms does not *per se* constitute a breach of the norm of reference in the review of constitutionality, namely the Constitution, but may be an argument to demonstrate a breach of the Constitution.¹⁷⁰

Regarding environmental issues, the Constitutional Court noted, for example, that Directive 2009/147/EC of the European Parliament and of the Council of November 30, 2009, on the conservation of wild birds and Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora as well as the provisions of article 191 para. (1) of the Treaty on the Functioning of the European Union, which enshrines the objectives of the Union's environmental policy, can be considered clear, precise, detailed aspects of the content of the right to a healthy environment, as they fulfill the former condition. However, regarding the latter condition, the Constitutional Court noticed that it protects the same fundamental value expressly enshrined in article 35 of the Romanian Constitution, that is, the right to a healthy environment; thus, their constitutional relevance on which a constitutionality control could be based by indirect reference to these norms is absorbed by the constitutional norm, which enshrines the protection of the fundamental right to a healthy environment. Because the Court established the constitutionality of the law under review by reference to article 35 of the Constitution, the arguments of the Court are applicable *mutatis mutandis* in the analysis based on article 148 of the Constitution.¹⁷¹

169 Decision no. 668/2011, published in the Official Gazette of Romania, Part I, no. 487 on July 8, 2011.

170 Dorneanu, 2022, p. 113.

171 Decision no. 313/2018, para. 32–33.

7. Conclusions and *de lege ferenda* proposals

The right to a healthy environment and the protection of future generations are important spheres in the constitutional existence of a state, and its action must be coherent and protective in these areas. Romania is a perfect example in the discussion of awareness in the environmental field as, initially, its Constitution provided only for state obligations but not the fundamental right of the human being. In 2003, after a difficult period of transition from communism to democracy, it has become evident that the Constitution must encompass the right itself. The case law that has been generated in these almost 20 years proves that a great deal of progress remains to be made with respect to the necessary development of the right to a healthy environment in the Constitutional Court's decisions. We can observe some tendencies in this case law, as follows: between 2003 and 2014, there are references to this right, but they are inconsistent, and the situation is similar to a puzzle when one attempts to search the jurisprudential line on the subject matter – in other words, it seems that the right in question is a marginal one among the overall catalog of fundamental rights and freedoms; between 2014 and 2022, there are more consistent references to this right, as the Court tends to develop it more thoroughly, to provide normative content, and to perform proportionality tests when it comes about restrictions on other rights determined by environmental issues. This reflects an evolution, and the Court seems not to be on a slippery slope when it analyzes aspects concerning this third-generation right. We can observe that constitutional awareness has been developed in the Court's jurisprudence in terms of protecting the environment, which is a valuable step for an Eastern European country in the field of the environment.

De lege ferenda, we can see that article 35 of the Romanian Constitution has general content, but the rationale of a constitution is to regulate the general principles and main aspects of the enacted rights and liberties. It is the task of a Constitutional Court to seek and identify the specific guarantees attached to the right in question and to develop the normative content of that right. Details are developed in laws and other normative regulation.¹⁷² However, in this context, constitutionalizing the prin-

172 In Decision no. 80/2014, para. 74–75, the Constitutional Court stated that the level of detail of the constitutional principles must be a minimum, and this task falls to the lower normative acts. Moreover, an overly detailed regulation of a field or social relationship has the effect of causing instability of the constitutional text. In this regard, the European Commission for Democracy through Law (the Venice Commission), stated that “the need for change in a given system depends on the length and level of detail of the constitutional text.” The more detailed the constitutional text, the more it identifies with ordinary legislation, and the more frequently it is subject to changes (see Report on the revision of the Constitution, adopted by the Venice Commission to the 81st plenary session, December 11–12, 2009). Considering the review procedure, the Romanian Constitution is a rigid one, and regulations detailing constitutional principles – true constants of law – cannot be found in its text. Regarding fundamental rights and freedoms, the aim of a constitutional review can only be to increase the level of protection of the citizen, both by extending the scope of fundamental rights and freedoms and by ensuring more effective guarantees of existing rights. It precludes minor changes to constitutional text.

ciple of sustainable development, the precautionary principle, and the principle of non-derogation seems justified; moreover, doing so would improve the Court's case law. However, these principles can be observed in the normative content of the right as the creativity of the Court cannot be underestimated. In its case law, the Court developed the doctrine of evolutionary concepts,¹⁷³ which means that a certain right or liberty does not have fixed and immutable content; rather, the content is adapted to the realities of the society in question. Theoretically, it would be a valuable step forward for the protection of the right to a healthy environment to enact, in the text of the Constitution, the aforementioned three principles. However, as we noted, the Constitution of Romania is a rigid constitution that is difficult to amend. Therefore, it is preferable for the Court to interpret article 35 in an evolutionary manner and to develop these principles from its general content.

Concerning the protection of future generations, the Constitution does not comprise normative texts in this regard; thus, the case law on this subject matter is non-existent. However, in securing the right to a healthy environment and establishing the exclusive property of the state upon certain assets or that every budgetary expenditure must have an established financing source, we can see that the intention is to preserve the present heritage for both the present and the future; the society secures "the rights" of the future generations. This is the perspective of the Romanian Ombudsman as, when it challenged a legislative act to the Constitutional Court, it expressly stated that "it has been recognized the public's right to information on the state of the environment and access to justice in case of violation of the right to a healthy environment, as well as the rights of future generations, based on the idea of preserving the natural heritage for the present and future."¹⁷⁴ Personally, I believe that there are no rights of or obligations toward future generations, but the present generation and the state have obligations to encourage procreation and ensure the continuity of the existent values and living conditions/welfare. Thus, in this constitutional context, an amendment to the Constitution seems necessary to broaden and improve the Court's case law.

173 Decision no. 500/2012, published in the Official Gazette of Romania, Part I, no. 492 on July 18, 2012, or Decision no.139/2021, published in the Official Gazette of Romania, Part I, no. 302 on March 25, 2021, para. (115).

174 See Decision no. 295/2022, para. (43).

Bibliography

- Alexy, R. (2003) 'Constitutional Rights, Balancing, and Rationality', *Ratio Juris*, 16(2), pp. 131–140; <https://doi.org/10.1111/1467-9337.00228>
- Arnardóttir, O.M. (2017) 'Res Interpretata, Erga Omnes Effect and the Role of the Margin of Appreciation in Giving Domestic Effect to the Judgments of the European Court of Human Rights', *The European Journal of International Law*, 28(3), pp. 819–843; <https://doi.org/10.1093/ejil/chx045>
- Dorneanu, V. (2022) 'Constitutional Courts Are the keystones of National Ethos', in: interview with Lénárd S., *Hungarian Conservative*, 2(3) [Online]. Available at: <https://www.hungarianconservative.com/articles/philosophy/constitutional-courts-are-the-keystones-of-national-ethos/> (Accessed: 12 June 2022).
- Duțu, M. (2013) *Introducere în dreptul penal al mediului [Introduction to environmental criminal law]*. Bucharest: Hamangiu Publishing House.
- Duțu, M. (2021) 'Provocări ale noului Drept al mediului și climei. Analize și perspective românești – Pentru un congres științific național' ['Challenges of the new Environmental and Climate Law. Romanian analyzes and perspectives – For a national scientific congress'] [Online]. Available at: <https://www.juridice.ro/essentials/4685/provocari-ale-noului-drept-al-mediului-si-climei-analize-si-perspective-romanesti-pentru-un-congres-stiintific-national> (Accessed: 12 June 2022).
- Enache, M. (2021) 'De la redactarea la exegeza Constituției României din 1991 – Experiențe și reflecții' ['From writing to interpreting the Constitution of Romania from 1991 – Experiences and Thoughts'] in Dorneanu, V., Manole, D., Benke, K., Papuc T. (eds.) *Patrimoniul constituțional și valorile democratice [Constitutional heritage and democratic values]*. Bucharest: Hamangiu Publishing House, pp. 77–97.
- Lazăr, A., Hosu, E. G. (2016a) 'Analysis of criminal cases concerning waiver/ discontinuing the prosecution/ dismissal of the case or non-prosecution by applying an administrative sanction for crimes laid down in Government Emergency Ordinance no. 195/2005 on environmental protection and Law no. 101/2011 on preventing and sanctioning certain facts regarding the degradation of the environment' in Lazăr, A., Duțu, M., Hosu, E.G., Duțu A. (eds.) *Environmental and forestry protection through criminal law*, Bucharest: Academiei Române/ Universul juridic Publishing Houses, pp. 62–89.
- Lazăr, A., Hosu, E. G. (2016b) 'Analyses of cases regarding forest crimes bearing definitive final judgements' in Lazăr, A., Duțu, M., Hosu, E. G., Duțu, A. (eds.) *Environmental and forestry protection through criminal law*. Bucharest: Academiei Române/ Universul juridic Publishing Houses, pp. 105–122.
- Pivniceru, M.M., Benke, K. (2015) 'The Principle of Proportionality Reflected in the Case-Law of the Constitutional Court of Romania. German Constitutional Influences', *Constitutional Law Review*, 1(1), pp. 73–93; <https://doi.org/10.47743/rdc-2015-1-0002>
- Selejan-Guțan, B. (2008) 'Comentariu la articolul 35 din Constituție' ['Comment on article 35 of the Constitution'] in Muraru, I., Tănăsescu, E.S. (eds.) *Constituția României – Comentariu pe articole [The Constitution of Romania – By article comments]*. Bucharest: C. H. Beck Publishing House, pp.
- Sohn, L. B. (1973) The Stockholm Declaration on the Human Environment, *The Harvard International Law Journal*, 14(3), pp. 423–515.

Legal sources

Laws

Constitution of Romania.

Law no. 104/2011 on ambient air quality.

Law no. 173/2008 on active interventions in the atmosphere.

Law no. 182/2000 on the protection of the national mobile cultural heritage.

Law no. 246/2020 on land use, conservation and protection.

Law no. 26/2008 on the protection of the intangible cultural heritage.

Law no. 278/2013 on industrial emissions.

Law no. 292/2018 on assessing the impact of certain public and private projects on the environment.

Law no. 293/2018 on reducing national emissions of certain air pollutants.

Law no. 407/2006 on hunting and protection of the hunting resources.

Law no. 458/2002 on drinking water quality.

Law no. 57/2020 on the sustainable management of Romania's forests.

Law no. 82/1993 on the establishing the Danube Delta Biosphere Reserve.

Water Law no. 107/1996.

Government Emergency ordinances/ ordinances

Government Ordinance no. 68/1994 on the protection of the national cultural heritage.

Government Emergency Ordinance no. 195/2005 on the protection of environment.

Government Emergency Ordinance no. 196/2005 concerning the Environmental Fund.

Government Emergency Ordinance no. 57/2007 on the regime of protected natural areas, conservation of natural habitats, wild flora and fauna.

Government Emergency Ordinance no. 59/2007 on the establishment of the National Program for improving the quality of the environment by creating green spaces in localities.

Government Emergency Ordinance no. 23/2008 on fisheries and aquaculture.

Government Emergency Ordinance no. 68/2007 on environmental liability with regard to the prevention and repair of environmental damage.

Government Ordinance no. 2/2001 on the legal regime of the contraventions.

Constitutional Court decisions

Decision no. 1/2012, published in the Official Gazette of Romania, Part I, no. 53 of 23 January 2012.

Decision no. 13/2015, published in the Official Gazette of Romania, Part I, no. 175 of 13 March 2015.

Decision no. 139/2021, published in the Official Gazette of Romania, Part I, no. 302 of 25 March 2021.

Decision no. 1416/2008, published in the Official Gazette of Romania, Part I, no. 77 of 10 February 2009.

Decision no. 142/2019, published in the Official Gazette of Romania, Part I, no. 356 of 8 May 2019.

Decision no. 158/2000, published in the Official Gazette of Romania, Part I, no. 566 of 15 November 2000.

- Decision no. 16/2022, published in the Official Gazette of Romania, Part I, no. 59 of 19 January 2022.
- Decision no. 186/1999, published in the Official Gazette of Romania, Part I, no. 213 of 16 May 2000.
- Decision no. 195/2015, published in the Official Gazette of Romania, Part I, no. 396 of 5 June 2015.
- Decision no. 197/2003, published in the Official Gazette of Romania, Part I, no. 545 of 29 of July 2003.
- Decision no. 24/2016, published in the Official Gazette of Romania, Part I, no. 276 of 12 April 2016.
- Decision no. 266/2013, published in the Official Gazette of Romania, Part I, no. 443 of 19 July 2013.
- Decision no. 268/2017, published in the Official Gazette of Romania, Part I, no. 629 of 2 August 2017.
- Decision no. 276/2016, published in the Official Gazette of Romania, Part I, no. 572 of 28 July 2016.
- Decision no. 286/2014, published in the Official Gazette of Romania, Part I, no. 569 of 31 July 2014.
- Decision no. 29/2016, published in the Official Gazette of Romania, Part I, no. 196 of 16 March 2016.
- Decision no. 295/2016, published in the Official Gazette of Romania, Part I, no. 616 of 11 August 2016.
- Decision no. 295/2022, published in the Official Gazette of Romania, Part I, no. 568 of 10 June 2022.
- Decision no. 313/2018, published in the Official Gazette of Romania, Part I, no. 543 of 29 June 2018.
- Decision no. 345/2003, published in the Official Gazette of Romania, Part I, no. 746 of 24 October 2003.
- Decision no. 358/2021, published in the Official Gazette of Romania, Part I, no. 736 of 27 July 2021.
- Decision no. 377/2017, published in the Official Gazette of Romania, Part I, no. 586 of 21 July 2017.
- Decision no. 418/2018, published in the Official Gazette of Romania, Part I, no. 625 of 19 July 2018.
- Decision no. 464/2019, published in the Official Gazette of Romania, Part I, no. 646 of 5 August 2019.
- Decision no. 485/2017, published in the Official Gazette of Romania, Part I, no. 783 of 3 October 2017.
- Decision no. 487/2014, published in the Official Gazette of Romania, Part I, no. 901 of 11 December 2014.
- Decision no. 500/2012, published in the Official Gazette of Romania, Part I, no. 492 of 18 July 2012.
- Decision no. 503/2010, published in the Official Gazette of Romania, Part I, no. 353 of 28 May 2010.
- Decision no. 506/2004, published in the Official Gazette of Romania, Part I, no. 68 of 20 January 2005.
- Decision no. 511/2017, published in the Official Gazette of Romania, Part I, no. 788 of 4 October 2017.

- Decision no. 54/2022, published in the Official Gazette of Romania, Part I, no. 212 of 3 March 2022.
- Decision no. 612/2009, published in the Official Gazette of Romania, Part I, no. 391 of 10 June 2009.
- Decision No. 62/2007, published in the Official Gazette of Romania, Part I, no. 104 of 12 February 2007.
- Decision no. 64/2015, published in the Official Gazette of Romania, Part I, no. 286 of 28 April 2015.
- Decision no. 668/2011, published in the Official Gazette of Romania, Part I, no. 487 of 8 July 2011.
- Decision no. 68/2004, published in the Official Gazette of Romania, Part I, no. 206 of 9 March 2004.
- Decision no. 681/2020 published in the Official Gazette of Romania, Part I, no. 959 of 19 October 2020.
- Decision no. 7/2001, published in the Official Gazette of Romania, Part I, no. 109 of 5 March 2001.
- Decision no. 734/2019, published in the Official Gazette of Romania, Part I, no. 133 of 19 February 2019.
- Decision no. 755/2012, published in the Official Gazette of Romania, Part I, no. 717 of 22 October 2012.
- Decision no. 766/2011, published in the Official Gazette of Romania, Part I, no. 549 of 3 August 2011.
- Decision no. 774/2014, published in the Official Gazette of Romania, Part I, no. 124 of 18 February 2015.
- Decision no. 774/2015, published in the Official Gazette of Romania, Part I, no. 8 of 6 January 2016.
- Decision no. 794/2016, published in the Official Gazette of Romania, Part I, no. 1029 of 21 December 2016.
- Decision no. 799/2011, published in the Official Gazette of Romania, Part I, no. 440 of 23 June 2011.
- Decision no. 80/2014, published in the Official Gazette of Romania, Part I, no. 246 of 7 April 2014.
- Decision no. 802/2009, published in the Official Gazette of Romania, Part I, no. 428 of 23 June 2009.
- Decision no. 824/2008, published in the Official Gazette of Romania, Part I, no. 587 of 5 August 2008.
- Decision no. 828/2017, published in the Official Gazette of Romania, Part I, no. 185 of 28 February 2018.
- Decision no. 851/2021, published in the Official Gazette of Romania, Part I, no. 454 of 6 May 2022.
- Decision no. 895/2015, published in the Official Gazette of Romania, Part I, no. 84 of 4 February 2016.
- Decision no. 897/2020, published in the Official Gazette of Romania, Part I, no. 335 of 1 April 2021.
- Decision no. 92/2015, published in the Official Gazette of Romania, Part I, no. 318 of 11 May 2015.
- Decision no. 95/2021, published in the Official Gazette of Romania, Part I, no. 642 of 30 June 2021.

Reports of the Venice Commission

European Commission for Democracy through Law (Venice Commission) – Report on constitutional amendment, adopted by the Venice Commission at its 81st Plenary Session (Venice, 11-12 December 2009).