

# WATER INFESTATION AS A CRIME UNDER ROMANIAN LAW

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## Abstract

*The purpose of this paper is to highlight the main theoretical issues concerning the enforcement of art.356 of the Romanian Criminal Code, in regard to the protection granted by several special regulations that protect water resources.*

*In order to establish a frame for the content of this article, its structure shall be divided into four parts.*

*The first part will consist of an introduction, in order to establish the importance of this subject and its actual status in Criminal Law literature.*

*The second part will represent the first half of the paper content and will consist of a special criminal law approach to the provisions of art.356 of the Romanian Criminal Code, most importantly pointing out its constitutive content.*

*The third part, namely the second half of the paper content, will refer to specific provisions found in art.92 of Law no.107/25.09.1996, namely The Water Law or in art.98, paragraph 4, let.b of Government Emergency Ordinance no.195/22.12.2005, regarding the protection of the environment and finally in art.49 of Law no.17/07.08.1990, regarding the Regime of interior maritime waters, of the territorial sea, of the contiguous zone and of the exclusive economic zone of Romania, and their relations with the provisions of art.356 of the Romanian Criminal Code.*

*The fourth and final part will consist of brief conclusions as resulting from the content of this article, respectively the actual configuration of water protection, by Romanian Criminal Law provisions today, with a de lege ferenda proposal.*

**Keywords:** *water infestation, environmental protection, criminal liability, crimes against the environment, water protection.*

## 1. Introduction

The importance of water sources is obvious today for everybody. Life itself and society as we know it depend on access to quality water, and therefore, it is expected for water purity to be protected even on a criminal scale.

Water is a renewable, vulnerable and limited natural source, indispensable for life

and society, raw materials and productive activities, energy sources and transport and a key factor in maintaining ecological balance<sup>1</sup>.

By law, the importance of water is recognized and the subsequent paragraph of the same article qualifies it as national patrimony, that needs to be protected as such, fact continuously supported by environmental literature<sup>2</sup>.

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<sup>1</sup> Article 1, paragraph 1 of Romanian Law no.107/25.09.1996, namely The Water Law, published in the Romanian Official Journal, no.244/08.10.1996.

<sup>2</sup> D. Marinescu, M. C. Petre, *Treaty of environmental law* (original title: *Tratat de Dreptul Mediului*), Universitara Publishing House, Bucharest, 2014, p. 165.

Water protection against infestation by any means is incriminated in the Romanian Criminal Code<sup>3</sup>, art.356. Alongside that provision, specific forms of water infection, prior to the enforcement of the Criminal Code, are found in art.92 of Law no.107/25.09.1996, The Water Law, or in art.98, paragraph 4, let.b of Government Emergency Ordinance no.195/22.12.2005, regarding the protection of the environment<sup>4</sup>, and finally, in art.49 of Law no.17/07.08.1990, regarding the Legal regime of interior maritime waters, of the territorial sea, of the contiguous zone and of the exclusive economic zone of Romania<sup>5</sup>.

This paper will establish the limits of the incrimination found in the Criminal Code, by reference to the provisions earlier mentioned, in order to specify the legal qualification of some actions that may represent the material element for both general and specific provisions subjected to analysis.

The expected outcome of this research is to highlight the effectiveness of the general regulations found in art.356 of the Criminal Code, nowadays, especially considering the fact that it is not a new type of incrimination, being almost identical to the provisions of the old art.311 of the 1969 Romanian Criminal Code, the only difference consisting in the penalty limits, and it is also similar to art.372 of the 1936 Romanian Criminal Code.

## 2. Water infestation, according to art.356 Romanian Criminal Code

Title VII, Chapter V of the Special Part of the Romanian Criminal Code incriminates water infestation, as a crime against public health, in art.356. According to paragraph 1 of the text earlier mentioned, *the infestation by any means of water sources or water networks, if the water becomes harmful to the health of humans, animals and plants, is punishable by prison between 6 months and 3 years or a fine.* Paragraph 2 of the same article stipulates: *The attempt is punishable.*

In order for an analysis, some terminological specifications must be made.

A *water source* is a natural accumulation or manmade installation which contains water, regardless whether it is drinkable or not.

*Water networks* consist of channels, pipes, aqueducts, gutters, that hold water<sup>6</sup>, or in which water circulates from a source to a consumer. I subscribe to the opinion<sup>7</sup> that water networks include water purifying machines or other technological equipment used to transport water between the source and the end-user. Equally, networks can be of natural origin, like a network of rivers or underground waters.

The special legal object consists in social relations regarding public health, by special reference to the security of water sources and networks<sup>8</sup>.

The material object of the crime is represented by the quantity of water found in

<sup>3</sup> Law no. 286/2009, published in the Official Journal no.510/24.07.2009 regarding the Criminal Code of Romania, enforced since the 1<sup>st</sup> of February 2014, actual on the 1<sup>st</sup> of March 2018.

<sup>4</sup> Published in the Romanian Official Journal, no.1196/30.12.2005.

<sup>5</sup> Republished, in the Romanian Official Journal, no.252/08.04.2014

<sup>6</sup> I. Tănăsescu in G. Antoniu, T.Toader (coordinators), *Explanations of the New Criminal Code* (original title: *Explicațiile Noului Cod Penal*), vol. IV, Universul Juridic Publishing House, Bucharest, 2015, p.816.

<sup>7</sup> I.Tănăsescu, *op.cit.*, p. 817.

<sup>8</sup> I. Oancea in V. Dongoroz (coordinator), *Theoretical Explanations of the Romanian Criminal Code (Explicații teoretice ale Codului Penal Român)*, vol. IV, 2<sup>nd</sup> edition, CH Beck and Romanian Academy Publishing Houses, Bucharest, 2003, p. 542.

sources or networks subjected to infection. On a water circuit between the source, the purification facilities and the end user, the material object will be represented only by the water upon which the infection is initiated. I appreciate that the infected water is only the product of the crime, not its material object.

The active subject of the offense can be represented by any person, either an individual or a moral person<sup>9</sup>.

The primary passive subject is society itself, as beneficiary of the social relations regarding public health, namely the security of water sources and networks. The secondary passive subject is the owner of the water source or network, which is not adequate for normal use anymore. If an individual is affected by the consumption of infected water, or the animals or plants of an individual or legal person are affected, I consider that person to be a tertiary passive subject.

The premise for the constitutive content is the preexistence of a source of water or a water network, destined for the use of humans, plants and animals. I do not appreciate that the water should be destined for consumption, firstly because the provisions of art.356 Criminal Code do not stipulate the need of consumption, and secondly because water can become harmful for humans even if it is used only for hygiene purposes. Equally, I cannot subscribe to the opinion that the premise is not met if the water source or network is only of individual use<sup>10</sup>, mainly because a private fountain, found in the private garden of a family, is subjected to multiple use, by all members of a family, or by

animals and plants living in that household. More than that, as mentioned in recent literature<sup>11</sup>, water originating from a particular source can end up being incorporated in different products destined for public use.

Contrary to specific literature<sup>12</sup>, I do not consider that the preexistence of technical provisions that qualify water as drinkable or for industrial use represent a premise for the crime analyzed. In this regard, art.356 of the Criminal Code, does not refer to technical measures to establish if the water infected is harmful for the health of humans, animals and plants and the effect of the crime should be evaluated *in concreto*, after the *verbum regens* has been executed.

The material element, from my point of view, can be fulfilled either by an action of infestation or by omission, for example, in the case in which an operator of a water purification plant doesn't take all the measures necessary to limit the quantity of chlorine to be inserted in the purification process, before sending the water on the distribution networks to the end-user.

Equally, it is important to see that the legislator stipulated the infection of water, *by any means*, fact that will include any action or omission that will change the quality of water in order to make it harmful for human, animal or plant use, regardless of the substances or procedures used: poison, chemical substances, bacteria, radiations, microbes, waste, etc.

The immediate consequence is a result, and consists of an alteration of the quality of water, in such a manner that it becomes harmful to humans, animals or plants. Establishing the fulfilment of the immediate

<sup>9</sup> Based on conditions of criminal liability of the legal entity imposed by art. 135, 136 and 137 of Law no. 286/2009 regarding the Criminal Code of Romania.

<sup>10</sup> I. Oancea, *op.cit.*, p. 541.

<sup>11</sup> V. Cioclei, L. V. Lefterache in G. Bodoronea, V. Cioclei, I. Kuglay, L. V. Lefterache, T. Manea, I. Nedelcu, F. M. Vasile, *The Criminal Code. Comment by articles* (original title: Codul penal. Comentariu pe articole), CH Beck Publishing House, Bucharest, 2014, p. 774.

<sup>12</sup> I. Tănăsescu, *op.cit.*, p. 816.

consequence is a matter of fact, and has to be done in a particular manner, mainly because plants and animals have different standards of harmfulness by water than humans. Secondly, there is no need for a person, animal or plant to be effectively harmed by the use of infested water. If such a result occurs, the perpetrator will also be held responsible for another crime against life, health or patrimony.

The causal relation must exist, and also must be proven for the incrimination to be effective.

In what concerns the subjective element, I consider that the crime can be committed both with direct and indirect intention, according to art.16, paragraph 6 of the Criminal Code. The mobile and purpose are of no interest to the legal qualification.

According to art.356, paragraph 2 of the Criminal Code, the attempt is punishable. It is important to notice that this is a difference from the old regulation of art.311 of the Criminal Code of 1969. Personally I consider this a progress, given the high importance of the incrimination and the great need of protection, both for public health and for the environment.

The punishment provisioned for the typical form is prison between 6 months and 3 years, or a fine. The limits are inferior to those stipulated by the ancient regulation, where the maximum was of 4 years.

Briefly I do not appreciate the new incrimination as being fundamentally different from the old regulation, with the reserves above mentioned.

### 3. Specific forms of water infestation, as provided by special regulations

**In this part, I will point out the main differences between the general provision for water infestation and the particular incriminations found in special legislation.**

Art.92 paragraph 1 of Law no.107/25.09.1996, The Water Law, stipulates: Discharging, dumping or injection into surface water and groundwater, in inland waterways or in territorial sea waters of waste water, waste, residues or products of any kind containing substances, bacteria or microbes, in an amount or concentration that may change the water characteristics, endangering the life, health, and physical integrity of persons, animal life, the environment, agricultural or industrial production, or the fishery fund, constitutes a crime and is punished by imprisonment from one to five years.

Firstly, this provision specifies the exact manner in which the infestation is incriminated<sup>13</sup>: Discharging, dumping or injection into surface water and groundwater, in inland waterways or in territorial sea waters.

I appreciate that surface water and ground water are generic terms that include water sources or water networks, as long as they are of natural origin. Man made installations, even if they contain water, cannot be included in this category.

Departing from the text, for the crime to be typical, it may seem that an essential request implies that the infestation must be done with *waste water, waste, residues or products of any kind containing substances, bacteria or microbes*. I appreciate that this is not limitative, given the fact that it can be

<sup>13</sup> M. Gorunescu, *Crimes against the environment* (original title: Infracțiuni contra mediului înconjurător), CH Beck Publishing House, Bucharest, 2011, p. 249.

done with *products of any kind*, containing *substances*. By using the generic term „substances”, without any specific differences, the legislator virtually incriminated water infestation by discharging, dumping or injection, regardless of the products used for the infestation.

The immediate consequence is a result, namely a change of water characteristics which would endanger the life, health, and physical integrity of persons, animal life, the environment, agricultural or industrial production, or the fishery fund. Personally, I see this outcome as more comprehensive than that of art.356 of the Criminal Code. Equally, the causal relation must clearly be proven.

Paragraph 2, letter a) of the same article stipulates: With the punishment provided in paragraph 1 the following acts shall also be sanctioned: pollution in any way of water resources if it is systematic and produces damage to downstream water users.

I see this version as an assimilated form of the crime provisioned in art.92, paragraph 1 mainly because the distinction of the material element in alternative forms disappears. More than that, for the crime to be effective two essential requests are stipulated: 1) the pollution of water resources needs to be systematic, meaning that the acts would imply a repeated form based on the same general resolution, in an organized manner, most suitable for industrial activities that generate water pollution, and 2) effective damage must be produced to downstream water users. It is not important if the damage results from harming the health or life of humans, animals or plants. It can also derive from delay of an economic activity, resulting in material, namely financial, damage for the person who provides that activity.

Another important delimitation must be made from the provisions of art.98, paragraph 4, let.b of Government Emergency Ordinance no.195/22.12.2005, regarding the protection of the environment. According to the text, *It is a crime, and it is punished with prison from 1 to 5 years, if it is likely to endanger human, animal or plant life or health: discharging waste water and waste from ships or floating platforms directly into natural waters or knowingly causing pollution by discharging or submerging dangerous substances or wastes into natural waters directly or from ships or floating platforms.*

The main difference from the provisions of art.356 of the Criminal Code is that *verbum regens* is only possible by *discharging* waste water and waste, or *discharging or submerging* dangerous substances or waste. The most striking problem is the similitude with the provisions of art.92, paragraph 1 of Law no.107/25.09.1996, earlier analyzed. It is clear that both the objective and subjective elements of art.98, paragraph 4, let.b of G.E.O. no.195/22.12.2005 are included in the constitutive content of art.92, paragraph 1 of Law no.107/25.09.1996. More than that, the penalty limits are exactly the same.

My appreciation is that we are facing a double incrimination of the same conduct, punishable in the same manner found in two different acts. This situation must be regulated as soon as possible, by abolishing the provision found in art.98, paragraph 4, let.b of G.E.O. no.195/22.12.2005. Equally, I consider that repealing the latter is a salutary step in simplifying the criminal legislation in regard to water protection, but also I find it normal to remove specific water regulations from the same paragraph as crimes regarding nuclear materials as they are both found in art.98, paragraph 4 of the act earlier mentioned.

The third essential delimitation that must be made in this study is between the provisions of art.356 of the Criminal Code and art.49 of Law no.17/07.08.1990, regarding the Legal regime of interior maritime waters, of the territorial sea, of the contiguous zone and of the exclusive economic zone of Romania. According to paragraph 1 of the latter, *It constitutes a crime and it is punishable by prison from 3 months to 2 years, or by a fine, the discharge of polluting substances from a ship into: a) inland waterways or harbors to which Marpol 73/78 applies; b) territorial sea; c) the exclusive economic zone or an equivalent area established in accordance with international law; d) the high seas.*

Judging by penalty limits and its constitutive content, respectively the immediate consequence does not imply a minimal damage done to the environment or to water quality, I appreciate this provision as an attenuated form of art.356 of the Criminal Code.

It is relevant to analyze an aggravated form of this crime, provided by paragraph 3 of art.49 of Law no.17/07.08.1990: The act provided for in paragraph 1, which has caused significant damage to marine life is punishable by prison from one to five years.

The immediate consequence is a *significant damage to marine life*, which has to be appreciated *in concreto*. This outcome is far wider than the provisions of art.356 of the Criminal Code<sup>14</sup>, but I believe it cannot coexist with the provisions of art.92 paragraph 1 of Law no.107/25.09.1996, namely because the area of protection is the same, and if the conditions of the latter incrimination are not fulfilled, then the legal qualification according to paragraph 3 of art.49 of Law no.17/07.08.1990 is possible.

#### 4. Conclusions

The expected result of this study is to establish the limits of water infestation, as a crime, regulated by art.356 of the Romanian Criminal Code, taking into account its relationship with special provisions discussed in the third part of this paper.

I consider that art.92 paragraph 1 of Law no.107/25.09.1996 represents an aggravated form by reference to art.356 of the Criminal Code.

If the action or omission that represents the material element of the crime is done against a water network or water source of anthropic origin, then, the only incrimination viable is the general provision of art.356, paragraph 1 Crim.Code. If the material object of the crime is water situated in natural water networks or sources, and the action is done by *discharging, dumping or injection into surface water and groundwater*, I appreciate that the legal qualification should be done according to art.92 paragraph 1 of Law no.107/25.09.1996, because, as shown above, the immediate consequence of the two crimes is covered by the latter provisions.

If the material element is done otherwise than by the three actions above mentioned, the only valid incrimination is that of art.356, paragraph 1 Crim.Code.

Considering the crime regulated by art.92 paragraph 2, letter a) of Law no.107/25.09.1996, I appreciate that if the action is done in a systematic manner, this regulation shall prevail, but if the systematic way of action has not been proven, the act can be legally qualified as the crime provisioned in art.356, paragraph 1 Crim.Code.

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<sup>14</sup> And I consider the crime regulated by paragraph 3 of art. 49 of Law no.17/07.08.1990 to be a specific aggravated incrimination for art. 356, paragraph 1 of the Criminal Code, considering that the outcome is an effective damage to marine life.

Regarding art.98, paragraph 4, let.b of G.E.O. no.195/22.12.2005, although it is a clear form of an aggravated crime by reference to art.356 Crim.Code, it is also a double incrimination of art.92 paragraph 1 of Law no.107/25.09.1996. It is obvious that the penalty limits are the same, the normative content is included in the latter provisions, and its place in G.E.O. no.195/22.12.2005 does not respect the natural organizing of criminal provisions by

the object of protection, therefore, I consider, *de lege ferenda*, that art.98, paragraph 4, let.b of G.E.O. no.195/22.12.2005 must be abolished.

Last, I have observed that art.49 paragraph 3 of Law no.17/07.08.1990 is a special aggravated form of art.356 Crim.Code, which shall apply accordingly if the conditions of the incrimination are fulfilled.

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