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Original Research Paper

CRIMINAL LAW REACTION TO ENVIRONMENTAL CRIMES - INTERNATIONAL STANDARDS AND SERBIAN LEGISLATION[1]

Ilic Ivan
Associate professor, University of Nis, Faculty of Law
ivan@prafak.ni.ac.rs

Abstract

In the paper, the author deals with the analysis of the normative international legal and domestic criminal legal framework for environmental protection. The importance of the criminal law protection of the environment was highlighted, with the relevant international documents in this area that Serbia ratified. The basic characteristics of the group of criminal acts whose object of protection is the environment, as prescribed by the Criminal Code of Serbia from 2006, are listed. The author particularly emphasizes the standards of protection, developed in practice by the European Court of Human Rights (hereinafter: the Court) in terms of proving the commission of criminal acts of environmental crime, as well as the specifics in terms of the burden of proof of these criminal acts. The author concludes that the aforementioned standards from the practice of the Court should be used in the jurisprudence of domestic courts.

Keywords*: environmental pollution, Criminal Code, crimes against the environment;*

Introduction

Every day we are witnesses that the media talk about the different types of environment treats. Unfortunately, risks to the environment increases, through the various manifestations. Forms of environment protection, that our community can take toward environmental polluters are different. This is primarily related to criminal protection, in the widest, but it can also undertake civil legal protection.

When we talking about criminal protection, various forms of protection are included, depending on the threat level, and the person who threaten the environment (natural or legal person). Therefore, we can talk about three forms - misdemeanor protection, corporate offenses and criminal offenses, bearing in mind the level of social risk.

1. Environmental protection at the international level

In the framework of international regulations there are two types of regulations: 1) Universal regulations, drawn up within and under the auspices of the United Nations and its agencies, and 2) Regional regulations, adopted by regional organizations such as the Council of Europe, the European Union and so

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on. In addition, a number of international organizations dealing with various issues related to protection, promotion and preservation of the environment.

A key turning point in relation to the environment protection within the United Nations was the United Nations Conference on the Human environment, which was held at the initiative of Sweden in Stockholm 1972. (*Stockholm conference*). At the Stockholm Conference, the UN Declaration on the Human environment was adopted, which contains the 26 basic principles of environmental protection, as well as a number of other decisions, that had significant meaning for the further development of international environmental law.

Besides the Stockholm Declaration, of great importance was the Decision to establish the central authority of the United Nations, which deals with the problems of environmental protection and the coordination of activities in this area - the United Nations Environment Programme - UNEP. The culmination of efforts by UNEP was the United Nations Conference on Environment and Sustainable Development, which contained 27 basic principles of environmental protection.

Advocating the concept of sustainable development, at the conference in Rio de Janeiro Agenda 21 - a global action plan for sustainable development for the 21st century was adopted. The signatories of Agenda 21 are 173 countries, including Serbia. Agenda 21 has enormous significance for the local government because, among other things, the role of local authorities was established (MILENKOVIC, D, 2006, 14-17). Local governments are obliged to regularly, promptly, fully and objectively inform the public about the state of the environment, or the occurrences that are the monitored, about immisions and emissions, and warning measures of pollution, which can pose a danger to people's life and health.

United Nations Framework Convention on Climate Changes was adopted and opened for signature in New York on 9th May 1992. At regular session of the Convention Conference of the Parties, the Kyoto Protocol was adopted, which is one of the most important documents related to this Convention. Kyoto protocol entered into force on 16 February 2005., and to date it is signed by more than 140 countries.

Kyoto Protocol commits 39 industrialized countries (which are listed in Annex I of the United Nations Framework Convention on Climate Changes) to reduce their overall emissions of six gases that cause the greenhouse effect, since 2008. to 2012. So, for the European Union, the USA, Japan, the goal is a reduction of gases that cause the greenhouse effect in average 6-8%.

The UN Convention on Biological Diversity, adopted at the Conference in Rio de Janeiro in 1992. The goals of the Convention are the conservation of biological diversity, the sustainable use of its components and equitable sharing of the benefits arising from the utilization of genetic resources.

1.1 Environmental protection in the Council of Europe

The Council of Europe has adopted a more documents (conventions, resolutions, recommendations), which occupies a central place environment. The main objectives of the Convention on the Conservation of European Wildlife and their habitats are: conservation of wild flora and fauna and their natural habitats, especially those species and habitats whose conservation requires the cooperation among the several states, the promotion of cooperation between the Parties in the field of environmental and special protection of endangered and rare plant and animal species.

Convention on civil liability for damage resulting from activities dangerous to the environment was opened for signature in Lugano on June 1993. It has not yet taken effect, because none of the countries - members not ratified this convention. Essential feature of the Lugano Convention is that it introduces the principle of strict liability, or liability without fault of the operator, which basis is risk posed by performing hazardous activities.

Convention on the criminal protection of the environment promoted the need of keeping a common criminal policy, aimed at the protection of the environment, the need of life and human health, flora and fauna and natural resources should be protected by all available measures, including criminal actions, the

necessity of violation of the principles of environmental regulations should be prescribed as a criminal offense, which is subject to appropriate sanctions. One of the major goals of this Convention is the prosecution and punishment of offenders, in the area of environmental protection and the desire to strengthen international friendly cooperation.

1.2 Environment protection framework of the European Union

The directions of development within the European Union on environmental protection is a process that is defined as "the emergence of the Community as an ecological actor". The same can be said for the effort to transform the "right to a decent environment" into a "real" human right. The Council of Europe and the European Union played, and still play, a particularly important role in these processes. Of the total number of provisions of EU law, at least 30% are regulations on environmental protection (MATIJAŠEVIĆ, J, DRAGOJLOVIĆ, J; JEŽ, Z, 2012, 294).

The Treaty of Lisbon from 2007, for the first time, sets not only protection but also "improvement of the environment" as a basic environmental goal. According to the provisions of this agreement, the protection and improvement of the environment and sustainable development should become basic values not only within the European Union, but also in relations between the EU and the wider world (Article 3 of the Agreement). In the field of environmental protection through criminal law, the basic source and the most important document is Directive 2008/99/EC on environmental protection through criminal law. The directive obliges member states to provide a system of criminal sanctions in their national legislation in connection with serious violations of the provisions of the Union environmental protection regulations. The Directive contains a list of environmental crimes which, if committed or their commission is aided or abetted with intent or gross negligence, must be defined as such by the national laws of the member states (Article 3 of the Directive). Finally, the Directive particularly emphasizes the need for the introduction and implementation of an effective criminal system for legal entities that will be able to deter them from committing environmentally harmful activities that can cause damage to the air, including the stratosphere, land, water, animal and plant life and conservation Species (PRLJA, D, STEPIĆ, D, SAVOVIĆ, D, 2012, 150-168)

2. National legislation

Environment as a special object of protection in criminal law of Serbia was first surfaced in 1977., with the introduction of the offense of environmental pollution in the then current Criminal Code (Article 133 of the CCS). Until then, indeed, there was some crimes (against the economy, public health, public safety), which secondary object of protection was the environment. In the Basic Criminal Code of Yugoslavia, some of criminality were included in Chapter XXII, which was entitled "Crimes against other social values". Later bring criminal law regulations classify environmental crimes in the head of the facility to protect a "human health and the environment". It was a reflection of the ruling, anthropocentric orientation, understanding that crimes against the environment actually protect human life and health.

In the Criminal Code of the Republic of Serbia from 2006. the environmental crimes are singled out into a separate head XXIII, under the title "crimes against the environment", which for the primary object of protecting have just an environment, in fact a human right to a healthy and well-preserved environment (DRAKIC, D, 2009, 219 – 229). It is an expression of present tendencies in modern criminal law, for the radical approach in tackling environmental crime is on the rise, due to technological and industrial development of humanity, which necessarily entails the creation of many new sources of danger. Besides, man, blindly following their way to increase profits often forgets the importance of a healthy

environment preservation. In such a situation the traditional administrative law protection, embodied in economic crimes and misdemeanours remains inefficient, and required an increased level of criminal repression, this "last resort", which is the *ultima ratio* in the protection of the most important properties.

A direct impact on the creation of a special category of criminal acts to the environment as the direct object of protection was the adoption of the Convention on the Legal Protection of the environment within the Council of Europe in 1998. It provides a number of obligations for States Parties to increase efficiency in environmental protection, predicting relevant environmental offenses with appropriate tools and instruments of criminal sanctions for offenders. The Republic of Serbia has not yet signed the Convention, but the very fact that the Council of Europe, accepts and shares the same values that are promoted within this international organization, and each document, adopted by the Council of Europe has at least an indirect influence on the legislation of Serbia.

The right to a healthy environment is promoted in the Serbian Constitution in Article 74 as follows: "Everyone has the right to a healthy environment and the timely and full information about the state. Everyone, especially the Republic of Serbia, and autonomous province, is responsible for environmental protection. Everyone is required to preserve and improve the environment". The positive frame completes a number of laws related to the environment (The Integrated Pollution Prevention and Control Environmental Impact Assessment Act, Nature Protection Act, Air Protection Act, etc.), most notably is Law on Environmental Protection, as well as numerous laws that operationalize the implementation of the law in this area, and many by - laws operationalizing the implementation of laws in this area (DICIC,M., ZORIC, N, 2009, 49).

In the above - mentioned chapter XXIV of the Criminal Code 18 environmental crimes is provided, which can be classified into two categories - environmental crimes in the narrow sense (which only protect the environment) and environmental crimes in the broad sense (which, in addition to environmental protection, protect also other social values). Some of these crimes are prescribed in the secondary, supplementary or additional criminal law (HERCEG, B., ILIC, I, 2011, 255-276).

By environmental offenses from Chapter XXIV of the Criminal Code the environment as a whole, or its individual segments, is protected. These are either different eco-media (water, air, soil), or flora and fauna, as well as special forms which are an integral, inseparable part. The environment is a set of natural and man-made resources, whose complex interrelationships make the environment and space and people's living conditions (Article 3 of the Law on Environmental Protection). Some of the prescribed offenses result in an abstract danger (for which the assumption is that it has been occured therefore the commission of criminal offense), while the other occurs as a result of violation of the particular danger or injury to an eco-medium, which must be proved in criminal proceedings in this particular case. As an indirect object of protection of these crimes, there is health and the human right to healthy living conditions (SKULIC, M, 2011, 12). It is notable efforts of the legislator, to make a balance between ecocentric and anthropocentric conception, by stipulating that environmental crimes.

3. Court practice

The criminal offense of environmental pollution appears very rarely in judicial practice. This is supported by the fact that in 2022, only 20 criminal charges were filed on the territory of the Republic of Serbia, of which as many as 16 were dismissed, in 12 cases due to the lack of grounds for suspicion, in three cases because the offense was not a criminal offense, and in one case applied conditional suspension of criminal prosecution. Only one person was found guilty and sentenced to a fine. Although the criminal law reaction to environmental crime is the last resort in preserving the environment, even a layman's view of the situation in reality is enough to conclude that there is a very large dark figure, but also that the judicial protection of the environment is, by all accounts, ineffective.

Data of the research indicate that convicted for crimes against environment in the period 2020-2022 accounted 12% of all convicted persons. 10 % of these were convicted for criminal offense forest theft. In the case law frequently appears illegal hunting (Article 276 CC) and fishing (Article 277 of the Criminal Code). Lately, prosecution for the murder and torture of animals increase. The crime of environmental pollution in the case law appears very rarely. This is supported by the fact that in the 2019 in the territory of the Republic of Serbia submitted to all 16 charges, of which 5 were dismissed, four of whom were from unknown perpetrators, while in 7 cases raised proper indictment. The charges are in most cases by the police, while the number of inspection bodies and citizens charges was negligible. Only one person was convicted and sentenced to a fine. Also, in 37 municipalities in Serbia has not run a single procedure for this crime, nor is there any judgment for environmental offenses in general. During the 2018. there was only one judgement for environmental pollution (STOPIC, M., DICIC, N., ZORIC, J, 2009, 55).

The perpetrators of these offences are exclusively male, average age from 41 to 48 years old, married, with children, with primary or secondary education, mostly unemployed and farmers, who were born in the country, citizens of Serbia, mostly convicted for less serious crimes. Mental capacity at the time of the offense by all perpetrators was clear. Most of them are unique crimes, where the motive for the execution was the appropriation of material gain, in average value of 19 000 dinars, while the continued criminal offense of forest theft occurs in a few cases.

As a mitigating circumstances in sentencing, the court took that the perpetrators of these acts correctly behave in court, they pleaded guilty and expressed remorse for their actions, that they are individuals with low monthly income,with the children they serve, that they expressed a willingness to compensate damage to the injured party. As an aggravating circumstances the court took the fact that the defendants, in most cases have already been convicted for the same offenses, from which we can conclude that these are the returnees.

Analysis of the first instance verdicts shows that in the majority of cases, the court ruled that the defendant was guilty, even in 65.48% of cases. In 18 cases (21.43%), the court acquitted the accused, while in only 3 cases (3.57%) delivered a dismissing judgment.

Looking at the type of the penalties against convicted for these crimes, the situation is as follows. The most common is conditional probation (74.54%), and imprisonment is rare. In several cases, the security measures forfeiture has been imposed. In comparation with previous studies, it can be concluded that the trend of sentencing close to the legal minimum is continued. The application of mitigating factors also significantly dominates.

Collected data show that the applicant is in charge of all 84 cases by the public prosecutor. Analysis of cases of these offenses shows that in neither case was not submitted an objection to the indictment. In terms of the number of hearings held from 84 court cases, most of those was held two hearings (27.38%), a smaller number of cases in which was held five or more sessions (26.19). In 21.42% of cases one hearing was held, in 20.24% of cases, three sessions, whereas only 4.76% of cases held four hearings.

According to collected data, in the procedures conducted for these crimes, rarely came to the suspension of the proceedings. The Court issued a decision to suspend the proceedings in only 2.38% of cases. In 7.14% of cases, the procedure ended ruling imposing judicial admonition. Analysis of the contents of the first instance verdicts, shows that in the majority of cases, the court ruled that the defendant was guilty, and that is even in 65.48% of cases. In 18 cases (21.43%), the court acquitted the accused, while in only 3 cases (3.57%) delivered a dismissing judgment. Looking at the type of the penalties against convicted for these offenses, the situation is as follows: The prison sentenced 16.36% of all convicted; The fine doomed 9.09% of all convicted;

The suspended sentence was imposed in respect of 74.54% of all convicted; An admonition was pronounced by 7.14% compared to all convicted; Security measure - seizure decision was convicted in 3.57%. This means that the mildest sanctions are the most frequently in the structure of the sanctions imposed. The most numerous is probation - 75.54% of all sanctions imposed on convicted persons.

The collected data show that in 51.19% of cases the procedure lasted up to 3 months. Between 3 to 6 months, the proceedings lasted in 27.38% of cases. Somewhat smaller number of cases the duration of the procedure from 6 months to 1 year and 20.23%. Proceedings that lasted for more than one year occur in 1.19% of cases.

According to the results, the appeal was not submitted against 52.38% of cases. In the structure of the persons who are legally entitled to appeal, the public prosecutor dominates, with 75%, followed by the defendant with 22.5%, while the injured appeares as complainant in 2.5% of cases. In large number of cases, the appelate court refused the remedy as unfounded, and upheld the first instance judgement in 62.5% of cases. The first instance court decision was reversed in 27.5% of cases. The decision which reverses a judgment has share of 10%. The collected data show that the extraordinary remedies are not submitted.

4. **Characteristics of the enviromental crimes evidence proceedings**

On the way to the discovery and illuminating of the crime, first step is knowledge to a crime of the authorized state bodies responsible for pretrial proceedings. The problem is that environmental pollution usually comes in the manufacturing process in the industry, by activities of responsible persons or employees which cause pollution or omission of necessary measures, and reporting by persons inside the pollutants is understandably, very rare (KOSTIĆ, M, 2009, 175). As an important source of knowledge figure reports, expert opinions and studies on the degree of vulnerability of the environment Bureau of Environmental Protection, then control of inspection, authorities, medical institutions and research institutes. In order to monitor the level of pollution of air, water and land in local government services have been introduced services for monitoring imissions and emissions, which play an important role in the process of proving the guilt of pollutants. However, the problem is that for the operation of these services there is no consensus of public authorities, which prevents the use of the findings in the criminal proceedings (DICIC, N, 2009, 56).

Recently, the role of various civic associations and non-governmental organizations dealing with the protection of the environment increasing, where citizens can report contamination cases. We should not forget the role of the media, which can greatly improve public awareness of the dangers of environmental pollution, and thus, indirectly encouraging them to apply themselves the execution of these crimes. In the case of reported criminal offenses, require timely reaction of the Police, in sence of going to the site and undertake site investigation. For the site investigation significant role is on inspectors with the necessary expertise, necessary to check the indications of the eco-medium pollution existence. Therefore, to detect the commission of the crime is of crucial importance to a chain reaction and coordination of these state bodies, and weakness of one of the links in the chain completely paralyze effectively illuminating of the environmental pollution (LJUŠTINA, A, 2007, 85-93).

Bearing in mind potential punishment for the basic form of these crimes, it will be judged in a short (summary) procedure. This means that by the intention of the legislator, the procedures for environmental offenses should be emphasized the principle of efficiency. This implies treatment of criminal proceedings subjects in accordance with the requirement of urgency, in the simplified form, envisaged by law, which aims to significantly shorter duration of the procedure, than the average.

From the range of evidence in criminal proceedings for these offenses the most important place, certainly has the expertise. We have already mentioned that the demarcation of the existence of the crime, from economic offenses and misdemeanors, legal standards "to a greater extent," "in the general area," and "large scale", should be operationalized. For this purpose the findings and opinions of experts, who possess adequate professional knowledge is essential, especially to respond to the question whether the reference value of the permitted level of pollution of air, water or soil above the maximum limits and to what extent. Based on precise refer-values that indicate the degree of pollution, which gives expert in his report, the court gives a legal assessment on the fulfillment of the above criteria necessary for the existence of the crime. As

evidence often can serve the official reports of the institutions about the contamination degree at the time of the commission of the offense. In judicial practice reports, findings and expert opinions have been used from Institute of Public Health, Center for Human Hygiene and Ecology, Republic Hydrometeorological Institute, the Institute for Nature Conservation of Serbia and others.Therefore, there is a wide array of institutions which can be delegated to making findings and opinions. It can often be a higher education institutions, such as the faculty of medicine, faculty of biology, faculty of science, faculty of veterinary medicine, faculty of forestry, etc. But in practice, it is a noticeable negative phenomenon of suspend proceedings, for lack of evidence, due to the inability to conduct forensic expertise, or under the pretext that the expert conducted late.

The role of witnesses as evidence in criminal proceedings in light of other environmental crimes is also important, whether it is a person holding a direct or indirect knowledge about the commission of the offense, or an expert witness, who may be called as a witness, to explain his findings and opinion. It should not forget the important role of site investigation as evidence, especially so. called investigating site investigation, due to the necessary actions in accordance with the request of urgency, in order to avoid the influence of objective and subjective factors on site (weather conditions, chemical reactions, and concealing evidence of a criminal offense by the perpetrators). Since it is often an area that is wider, the investigating team will often be numerous, where the coordination of site investigation head was necessary, in order to eliminate any evidence and information obstruction (LUKIĆ, T, 2008, 689). During the dynamic phase of the site investigation is almost necessary to implement a situational expertise, which runs on the site, with the use of forensic apparatus within the distinctive mobile laboratories.

Finally, with regard to the imposition of appropriate penalties for perpetrators of environmental crimes, the most effective consider the fine, although in the case of execution qualified form of the offense, the offender is required to act imprisonment. However, bearing in mind the lenient sentencing of courts in Serbia, we propose the application of the so. called deferred prosecution (conditional postponement of prosecution), based on art. 283. of the Criminal Procedure Code of Serbia, while potentially effective consider the possibility of imposing measure the performance of community or humanitarian service (Art. 283, paragraph 1, item 3 of the CPC), where the condemned may be involved in the work of the Environmental Protection organisation, while for the legal entities can be an effective measure of payment the amount of cash for a humanitarian organization, fund, or public institutions (Art. 283, par. 1, item 2 of the CPC), in which case the users may arise as those facilities that care for the protection and improvement of environmental protection from pollution (ILIC, I, 2010, 405-434).

Conclusion

Although the criminal law response to environmental crime is a last resort to preserve the environment, but even the secular view of the situation in reality is sufficient to conclude that there was a large dark figure, but that the judicial protection of the environment, is apparently ineffective. Lenient sentencing of the courts shows that the judges and the whole range of competent services (police, inspectors, public prosecutors) do not yet recognize the importance of protecting natural resouries, natural phenomenon, or particular protected plants or animals. Penal policy for environmental offenses is inadequate because it is too lenient. This is corroborated by the fact that during the 2009. there were only 10 of prison sentences, often lasting up to 6 months. Insufficient use of so-called. situational site investigation and the necessary expertise, results in insufficient evidentiary foundation. This means that additional training for all authorized official of the criminal procedure should be carried out, then public campaign and stricter penal policy, in order to reduce the dark figure and to discourage potential offenders in the future. There is a tendency to extend the criminality zone, however, the processing of existing incrimination is of greater importance to the public interest in this area.

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