Comparative analysis of the EU criminal law for environmental protection and the Albanian one

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Abstract

This paper consists of two main parts where the first one presents the path how the environmental issue was included in the primary legislation of the European Union (EU), starting this theoretical panorama from the first founding treaty – Treaty of Rome, in 1957. It shows that with the passing of years the environmental protection has become one of the most important fields of action of the European Community supported by the primary and secondary legislation of the EU and its several bodies with competencies in this field.
The second part of the paper starts with the commitments on the environmental protection that the Albanian state has made upon signature and entrance into force of the Stabilisation and Association Agreement with the EU. In addition, this article presents a summary of the legislative activity in Albania regarding environmental protection in the last two decades with special focus on the time period after the approval of the current Constitution of 1998, which is the basis and origin of every legislative initiative. Furthermore, there are presented the key features of the Albanian environmental legislation, as well as the protection mechanism from the criminal legislation point of view. The presentation of the European and national reality with special focus on environmental protection serves to a comparative purpose between the two models. It also serves to draw conclusions and propose suggestions on how the Albanian legislation should be developed and improved in order to be in line with that of the European Union and effective in practice to serve the ultimate goal of environmental protection and prevention from further environmental degradation.

Keywords: EU directive, environmental protection, judicial process, damage reparation, environmental criminal offence.

Introduction

The basis for establishing the European Community has been the development and strengthening of economy within the European continent. The Treaty of Rome that established the European Economic Community clearly articulated such objective (Treaty of Rome, 1957, Articles 2 and 3). It is obvious and clear to understand that in the Treaty of Rome, the word 'environment' was not present at all. As mentioned above the main objective of the newly established community was of an economic nature. In addition, at the beginning of the second half of the twentieth century, the potential environmental impact of economic policies approved and implemented was not distinguished or perceived. It was only in the early 1970s that the need for some form of policy on the environmental protection was affirmed (Bell, S., McGillivray, D., (2008), 184). A reason for this change served the acceptance of the interrelation between economic growth and environmental degradation. In October 1972, the heads of states of the today's European Community announced that the economic expansion

is not a goal in itself and requested the European Commission to engage in drafting a specific an environmental policy for the European Community (National Centre for Technology in Education, Dublin, Ireland, http://www.ncte.ie/environ/fifth.htm). This gave start to the First Action Programme on the Environment which encompassed an environmental policy for a five year period. Since 1973, the EU has relied on successive Environment Action Programmes to strategically guide the development of European environmental policy. The 6th Environment Action Programme (6EAP), was adopted in July 2002 and establishes a 10 year framework for Community action on the environment (Institute for European Environmental Policy http://www.ieep.eu/topics/governance/environmental-action-programmes/2011/03/final-report-for-the-assessment-of-the-6th-environment-action-programme). According to the assessment report on the 6th Environment Action Programme concluded at the beginning of 2011 (while the programme itself is ongoing until the end of the year 2012) it adds value to the implementation of EU policy for a better protection of environment at least within the boundaries of the European Community. All member States are obliged to implement the numerous thematic directives on environmental protection (Final Report for the Assessment of the 6th Environment Action Programme, DG ENV.1/SER/2009/0044, (2001), 242-244).

2. Legal basis of European Community policy

At present, what we consider as 'constitutional' basis for environmental policy and law within the European Community can be considered in two stages and the dividing line is the Single European Act of 1986 (Bell, S., McGillivray, D.,(2008), 185-187).

2.1. Period before the Single European Act of 1986

Before this year, the legal justification for the EU environmental policy was not totally clear. Two articles (94 and 308) of the Treaty of Rome were referred to for justification of Community's actions for environmental protection. The majority of Directives, especially those relating to pollution control and common standards and those with much purer environmental content such as the Directive on Wild Birds, tended to be justified on the basis of these two articles of the Treaty of Rome. Furthermore, the European Court of Justice has cited them in concrete cases it has delivered decisions on (Case 91/79 *Commission v. Italy* [1980] ECR 1099).

2.2. Changes through the Single European Act of 1976 for the environmental policy and law

The Single European Act of 1986 introduced some amendments to the Treaty. Among other changes, it added a new title relating to the protection of the environment. With this Act the lawmaking power in relation to environmental issues are clear and explicit. These changes established some clearer constitutional rules. In addition, some important environmental principles such as "polluter pays" and "prevention of damage" were added by the Single European Act to the founding Treaty.

2.3. The Treaty on European Union 1992 (the Maastricht Treaty)

The Maastricht Treaty continued the process of integrating environmental issues into the activities of the European Community by making additional amendments to the

founding Treaty. The merit of the Maastricht Treaty can be identified with its recognition of the development of a policy in the field of environment as one of the main activities of the European Community.

2.4. Treaty of Amsterdam 1997

Through this Treaty a new main goal of "promoting a harmonious and balanced and sustainable development of economic activities", together with "a higher level of protection and improvement of the quality of the environment" was included in the previous provisions of the founding Treaty, which applies to all policies and all institutions, not only to Commissions initiatives. The additions introduced with the Treaty of Amsterdam entered into force in 1999.

2.5. Consolidated Treaty of the European Union

Under the Consolidated Treaty of the European Union there is a specific Title on the Environment (C 83/132 EN Official Journal of the European Union 30.3.2010). There are three articles that deal with the environment within it. The principal objectives of the European Union policy on the environment include the preserving, protecting and improving the quality of the environment, protecting human health, prudent and rational utilisation of natural resources, promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change. These objectives are built upon the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay. In this context, harmonisation measures answering environmental protection requirements shall include, where appropriate, a safeguard clause allowing Member States to take provisional measures, for non-economic environmental reasons, subject to a procedure of inspection by the Union. The protective measures that Member States implement in accordance with the provisions of the consolidated version of the Treaties of the European Union do give power to Member States to maintain or introduce more rigid protective measures which should be notified to the European Commission.

3. Use of criminal law for environmental protection

The criminal law can be used in two ways: either to provide direct criminal sanctions for environmental harm, or as a complement to a given regulatory system. It tends to be of a greater influence when used in the second was. This is because the main purpose of the criminal law is to punish clearly identified wrongdoings. While in relation to many environmental issues it is often impossible to identify wrong without reference to other factors. Taking an example, it is very desirable to have industry and many other activities to create and maintain job positions, but these economic activities cause pollution. The question in this case might be: "How much pollution is acceptable?" In giving an answer (not necessarily the best or the fairest one) to this issue of concern several factors should be taken into account. The political one is definitely very important. Legislation has a direct influence by the political climate of

the time a said normative act is drafted, approved and implemented. The European Community had established a system of civil liability showing its effort towards this objective as early as the year 1993 (Directive 2004/35/EC on environmental liability). It underlines the precautionary and shared responsibility principles.

3.1. Definition of environmental crime

A single definition of the environmental crime does not exist. As with other key terms in environmental law, these definitions reflect different perspectives. According to one point of view the environmental crime should cover activities that may be lawful or licensed, but which cause significant environmental harm (Halsey, M., (1997), 217). Another point of view is the consideration of environmental crime as a crime across international boundaries. In the European Community the notion is described as all kinds of offences either created by statute or developed under the common law that related to the environment (Sixth Report of the Environmental Audit Committee, Session 2003-2004 - Environmental Crime).

In the European Community the issue of deciding who has the authority to determine whether environmentally harmful conduct should be subject to criminal sanctions is topical and is the subject of a long-running debate between the European Commission and the member States. In 2006, the European Court of Justice declared that the Commission has the right to define environmental crimes and sanctions. So, this Court chose to distinguish environmental crimes from more traditional crimes. In addition, the European Court of Justice held that the European Community Treaty gave the Commission the power to lay down common criminal rules for environmental crimes and sanctions, which it could use if it could show that there was a need to do so (Case C-176/03 *Commission v. Council* [2006] Env LR 18). This Court gave the following reasoning:

As a general rule, neither criminal law nor the rules of criminal procedure fall within the Community's competence…However, the last mentioned finding does not prevent the Community legislature, when the application of effective, proportional and dissuasive criminal penalties by the competent national authority is an essential measure for combating serious environmental offences, from taking measures which relate to the criminal law of the member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective.

3.2. European Directive on Environmental Crime

(Directive 2008/99/EC on the protection of the environment through criminal law)

The notion that individuals and corporations bear a responsibility towards the environment is not new. The Stockholm Declaration referred in Principle 1 to man's 'solemn responsibility' to protect and improve the environment. The 1994 Draft Principles on Human Rights and the Environment state:

"All persons…have the duty to protect and preserve the environment".

Thus, the use of criminal responsibility can be justified starting from the international legal instruments and arriving at domestic legislation. The importance of criminal responsibility is that it provides added incentives to refrain from harmful conduct and by allowing more stringent enforcement measures or penalties to be imposed (Birnie, P., Boyle, A., Redgwell, C., 2009, 329).

The Environmental law has developed significantly in the last 30 years or so. More than 200 directives in the field of environment are in force. However, there are still many cases of non-observance of Community environmental law. It needs to be implemented in an effective way. Unlike theft or homicide, for example, which may cause personal benefits only to the criminal, most polluting activities generate substantial societal benefits as well as environmental costs. Thus, environmental law in many countries is aimed largely at an administrative control of pollution, usually through licensing and permitting systems. Environmental criminal statutes largely function to help ensure that control. The interweaving of administrative and criminal law has been pronounced from the beginning of modern environmental crimes in the mid-twentieth century. Then, as now, environmental criminal law focused on punishing the lack of a permit or the violation of permit or other regulatory requirements and conditions. Despite environmental criminal law's continued administrative dependence, however, the weakness of this approach has been pointed out at European level. In addition, unlike the situation with traditional crimes, administrators (not legislators) decide what is and is not criminal (Faure, M., 2008, REV 68). This critique of the absolute administrative dependence of environmental criminal law has affected European legislation and international conventions (Mandiberg, Susan F., Faure, Michael G., 2009, 447-510). As a result, legislators are increasingly using models of environmental crimes.

The interpretation and decision made by the European Court of Justice in 2006 served as an incentive for the Commission to propose a Directive on Environmental Crime. In a previous judgement given on 13 September 2005, the Court held that, although the Community legislature has no general competence in criminal matters, It is competent, under Article 175, to ask the member States prescribing penalties for infringements of Community environment protection legislation if it takes the view that that is a necessary means of ensuring that the EC environmental legislation is effective. It stems from the Judgment of the Court that the EC legislature can adopt a Directive based on article 175 if:

- The main purpose of this act is the protection of the environment;
- Member States national legislation differs as regards the constituent elements of various criminal offences committed to the detriment of the environment;
- The criminal penalties applicable to the various criminal offences differ greatly from one Member State to another and are not effective, proportionate and dissuasive.

The most known areas of environmental crime are the illegal emission or discharge of substances into air, water or soil, the illegal trade in wildlife, illegal trade in ozone-depleting substances and the illegal shipment or dumping of waste. Environmental crimes cause significant damage to the environment in Europe and the world. At the same time they provide for very high profits for perpetrators and relatively low risks of detection. Very often, environmental crimes have a cross border aspect.

That is the reason why the Commission proposed a directive which requires the Member States to provide for criminal sanctions for the most serious environmental offences because only this type of measures seems adequate, and dissuasive enough, to achieve proper implementation of environmental law. Studies at EC level have shown that there are large differences between the criminal sanctions provided for environmental offences in the Member States (Study JLS/D3/2006/05, Final Report,

Brussels, (2007)). The existing criminal sanctions are not sufficiently stringent to ensure a high level of environmental protection throughout the Community. The Directive provides for minimum requirements to be implemented in national criminal law. Environmental crime is a serious and growing problem that needs to be tackled at European level. The aim behind the proposed Directive is seemingly to provide consistency between different member States' regimes for environmental crime. The Directive would make no wholesale changes to domestic legislation, although the treatment of 'serious' offences committed intentionally or with serious negligence could raise some issues. These 'serious' offences must be punishable by a maximum of at least five years' imprisonment and fines for companies of at least 750,000 Euros. In addition, the role of alternative sanctions, including restorative and administrative penalties, is also included.

3.3. Is a specialised EU environmental court needed?

Such court has existed in Australia for many years (Grant, M., (2000)). The court consists of judges and technical specialists and deals with criminal prosecutions, civil enforcement, appeals and judicial reviews in relation to a range of planning and environmental legislation. Proceedings are open to any person and there is a great flexibility in terms of procedures and remedies. In the European Union such an issue has not emerged yet. Taking into account to lately adopted directive on environmental protection through criminal law and its content stressing the implementation at national and not communal level it seems premature if not unrealistic to tackle and elaborate this discussion at present. So far, the European Court of Justice has proved to be a useful and important mechanism to interpret and adjudicate on cases that have environmental implications.

4. Environmental crimes in Albania

4.1. Albania's commitments in relation to the Stabilisation and Association Agreement with the European Union

The Albanian environmental legal framework is in a process of continuous progress and enhancement. The EU environmental law serves as a pattern to be followed with this regard. Based on the Stabilisation-Association Agreement between the EU and Albania, our State has the obligation to fulfil its terms and report regularly on its implementation. This is a precondition to join the EU family ("Stabilisation-Association Agreement between the European Community and its member States and the Republic of Albania" (http://www.mie.gov.al/?fq=brenda&m=sh faqart&aid=98)). The need for a new set of laws with the ultimate goal of environmental protection has been articulated since 2001 in the Environmental National Action Plan of the Ministry of Environment, Forests and Water Administration.

The Stabilisation-Association Agreement between the EU and Albania tries to address the issues of economic development and social stability in our country. These goals can be achieved taking into consideration among others environmental implications of concrete State policies. This Agreement has one article on environment providing for co-operation between parties against environmental degradation and promotion of environmental sustainability. Since entry into force of this agreement, in 2009 the

Albanian State has observed the term of enacting new legislation which is in line with the EU's one on environmental protection. Nevertheless, much more should be done in fulfilling the requirement of proper implementation of this legislation. Thus, every new piece of legislation on environment includes full reference to EU directives that regulate the same environmental thematic issue.

4.2. EU's Progress Reports on Albania for the area of environment (*http://ec.europa.eu/enlargement/pdf/key_documents)*

The European Union issues every year its assessment reports on Albania based on the Stabilisation and Association Agreeement entered into force in 2009. These reports include a specific chapter on environmental situation (legal framework and administrative capacities). Based on the conclusions of these reports over the years in the environmental area there has been some progress in the horizontal legislation, while transposition of the legislation on strategic environmental assessment has not progressed with the same pace. In addition, they state that there is not much progress in the areas of access to justice and facilitation of public participation. Overall, Albania has made little progress in legislative developments and alignment with the environment *acquis.* Furthermore, Albania should systematically integrate environmental aspects into other sectors (economic and social ones).

4.3. Albanian criminal law on environmental protection

The Albanian criminal law is codified, differently from the environmental law which is dispersed in many laws. The Albanian Criminal Code provides for environmental offences under a specific chapter (Chapter IV) environmental offences. Thus, there are seven articles on what are considered environmental crimes in Albania, as follows:

1- Air pollution
2- Transport of toxic waste
3- Water pollution
4- Prohibited fishing
5- Illegal cutting of forests
6- Cutting of decorative and fruit trees
7- Breach of quarantine of plants and animals. (Criminal Code of the Republic of Albania, Law no. 7895, dated 27.01.1998, articles 201-207),

Less serious breaches of legislation are the administrative misdemeanours which are stipulated by various environmental laws. The relevant sanctions are administrative ones, like fines and stringent measures related to licensing of economic subjects. Sanctions include fines or imprisonment and the later varies from three months to 15 years.

If we compare the content of the Albanian Criminal Code's articles with those of the EU Directive on environmental protection we notice that at EU level environmental crimes exceed the number of actions classified as environmental crimes in Albania. This is a result of various reasons:

- Criminal Code of Albania has been enacted in 1995, while the EU Directive on environmental crime pertains to the year 2008;
- Most of environmental legislation violations in Albania are found in various environmental laws in the form of administrative misdemeanours and punishable

primarily by fines.
- the EU Directive sets forth the range of subjects that can be taken under criminal responsibility, where individuals have equal status with juridical persons.

Conclusions

The consequences of failing adequately to address environmental crime are potentially disastrous. To address a global challenge as environmental crime, an appropriate response is required to reduce it to levels. Quantifying what that "acceptable level" of crime might be is difficult, but an adequate response may be one where all stakeholders are doing all that can be done. So far, efforts to combat environmental crime fall short of this benchmark. Legislation is all too often inadequate; the existence of dedicated agencies, which could develop specialist knowledge of organised crime groups and methods, are a rarity.
Bearing in mind that prevention is the most effective way to combat crime, consideration should be given to administrative and legal reforms. There is perhaps a fundamental lack of awareness of the scale of the problem. Furthermore, there needs to be recognition that, unlike other forms of crime, this one is time critical (Environmental Crime – A threat to our future, (2008), 24). In order to redress the balance, the international community should finally accept that environmental crime requires a substantial, committed and sustained global response – and act immediately before it is too late for current of future generations.
At the EU level is noticed the underlining of the idea of protecting the environment through criminal law. The final goal is prevention, followed by punishment when other forms of legislation fail to succeed (White, R., (2005)). Often it is difficult to measure the environmental harm. If we take into account future consequences it is even more difficult. The adoption of an EU Directive on protection of environment through criminal law has been considered a positive step by the EU highest authorities. In order to evcaluate its effectiveness we should be patient to observe its implementation scale in the coming years since its transposition in member States was foreseen by end of 2010 and almost half of the EU member States failed to observed this deadline as mentioned above.
Passing to Albanian case from the few cases of environmental crimes adjudicated over the last five years at Tirana District Court (the biggest court in the country) it can be presumed that the relevant legislation is observed. Another explanation is the lack of awareness among public and effective action from state authorities against environmental crimes. The latter can be illustrated with the mild sanctioned asked by prosecution in the concrete cases examined above. When preventive measures fail to be taken, sanctions against those that breach the environmental legislation should apply. Criminal sanctions can be more effective than administrative measures. Sometimes fines (even those considered high ones) can be easily afforded by big companies and they can continue to further breach the legislation because their profit can exceed fines imposed on them. Since at EU level are stipulated very high fines, this pattern can be adopted even in Albania and investigation authorities are different from licensing one.
Since the Albanian Criminal Code is drafted and approved in 1995 while legal

developments at EU level are recent, the chapter of environmental crimes should be reviewed by encompassing more types of environmental crimes, and making criminal sanctions more rigorous. Last but not least, public awareness campaigns starting at young age societal groups can be of help in preventing environmental crimes.

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