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ACCESS TO JUSTICE IN THE FIELD OF THE ENVIRONMENT WITH SPECIAL REFERENCE TO LIABILITY FOR ENVIRONMENTAL DAMAGE, ENVIRONMENTAL CRIMINALITY, AND ENVIRONMENTAL FORENSICS IN THE REPUBLIC OF SERBIA

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Abstract
The paper discusses aspects of access to justice, ie, the concept of liability regarding the damage to the environment and environmental crime. An overview of the provisions of the Directive on environmental liability regarding environmental damage is given. Cases of access to justice related to environmental crime and environmental forensics are presented. The main aspects of access to justice under the Aarhus Convention are explained. Problems, challenges, and dilemmas in the implementation of access to justice in the field of environmental crime are pointed out. An assessment of the implementation of access to justice in the segment of liability for environmental damage and punishment for torts in the field of the environment is given. It is considered whether the concept of liability for environmental damage is more effective than criminal environmental protection in terms of actual environmental protection.

Key words*: access to justice, environmental crime, environmental forensics, liability for environmental damage, Aarhus Convention.*

1. Liability for Environmental Damage

After the Chornobyl environmental accident that occurred on April 26, 1986, Europe was rocked by another major environmental accident, the spill of toxic chemicals stored by the Sandoz company into the Rhine River near Basel (Lucas, 2001). This environmental accident, which took place on November 1, 1986, caused water pollution to such an extent that a red toxic flow was visible for weeks in a length of 70 kilometers. The pollution affected the course of the river that passes

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through four states. The entire population of fish in the Rhine River was destroyed, as well as the flora and fauna that inhabited the banks of the Rhine. On this occasion, criminal proceedings were initiated against the persons responsible for the company, but the question of how the damages will be compensated is also open. Lawsuits for compensation for damage, which were filed by Switzerland, Germany, France, and the Netherlands, ended with a settlement, so on this occasion, judicial practice did not formulate positions that would be applied in future cases of compensation for environmental damage (Drenovak-Ivanovic et al. 2013: 52-53). Encouraged by this case, in the absence of rules on compensation for environ mental damage at the European Union level, the European Commission submitted a proposal for a future policy to solve this issue with established guidelines for its regulation. In this proposal, it is emphasized that the issue of compensation for damage to the environment must be regulated in accordance with the general principles of civil law, i.e. with the idea that the person who causes the damage has an obligation to compensate it. When it comes to compensation for environmental damage, the general rules of civil law are not sufficient to achieve environmental protection, so it is necessary to form a special legal regime that corresponds to its complex nature (Green Paper on Remedying Environmental Damage, 2003). After consideration of this proposal, Directive 2004/35/EC of the European Council and the European Parliament on Environmental Liability with Regard to the Prevention and Remedying of Environmental Damage was adopted in 2004 (hereinafter: Directive on Liability for Environmental Damage).

The Directive on liability for environmental damage aims to establish a common legal framework for the prevention and remedying of environmental damage and to supplement the existing nature protection regime established at the EU level, regulated by the Directive on the protection of wild birds (Council Directive 79/409/EEC) and the Directive on habitats (Council Directive 92/43/EEC). The aforementioned directives do not contain provisions on liability, which makes it impossible to establish liability for damage caused to protected species and habitats protected by the aforementioned directives, to implement remediation measures, i.e. to eliminate damage, or to reimburse the costs of these measures if public authorities implement them (Brans, 2013: 31-32).

The purpose of this directive is to establish a framework plan for environmental liability based on the "polluter pays" principle, in order to prevent and eliminate environmental damage, as well as to provide legal conditions for environmental polluters to become financially responsible for remediation and prevention of environmental damage (Janjatovic et al., 2015). The Environmental Liability Directive aims to prevent and remedy environmental damage, without affecting the right to compensation for ordinary damages arising from the right to compensation for damages in accordance with the rules of civil law or the right to compensation for damages arising from from an international agreement that regulates civil liability for damages (Directive on Environmental Liability 2004/35/EC). This further means that this directive does not apply to compensation for bodily injury, compensation for damage caused to a person's property, or

compensation for actual damage. The performed analysis shows that Directive 2004/35/EC provides additional legal protection than that guaranteed by the rules of civil law, which starts from the fact that damage always implies the existence of an injured person (Krämer, 2012: 174). Damage in the environment is very complex and cannot be reduced only to damage suffered by a specific person. In practice, one can find examples in which fish have been destroyed on a river into which wastewater is discharged by several operators, or in which it is not possible to identify the person who suffered specific damage, but it is an injury that has a predominantly public law character, such as, for example, pollution of the river or forest land.

The directive foresees objective and subjective responsibility for damage to the environment depending on the operator's activity. An operator who causes damage to the environment or is in immediate danger of damage to one of the activities listed in Annex III of the Directive is responsible according to the principle of objective responsibility, regardless of fault. An operator who causes damage or immediate danger of such damage to protected species and natural habitats through some other activity that is not listed in Annex III of the Directive is liable according to the principle of subjective responsibility - if he makes a deliberate mistake or makes a mistake through negligence. Activities listed in Annex III of the Directive refer to activities covered by Directive 96/61EC on integrated prevention and control of environmental pollution, as well as EU regulations related to the transport of hazardous substances, waste management, and the release of genetically modified organisms. These activities from Annex III represent activities that are extremely dangerous for the environment (Brans, 2006: 5).

In the Republic of Serbia, liability for environmental damage is regulated by the rules of civil and criminal law. The Law on Environmental Protection ("Official Gazette of RS", No. 135/04, 36/09, 72/09, 43/11, and 14/16) (hereinafter: LEP) in Art. 107 and 108 regulate liability for environmental damage. The LEP stipulates that anyone who suffers damage has the right to compensation. Compensation claims can be submitted directly to the polluter. Proceedings before the court for compensation of damages are urgent. The general rules of the Law on Obligations (hereinafter: LO) are applied to issues of liability for environmental damage that are not specifically regulated by this law. In terms of liability for environmental damage following the requirements of the Directive, the provisions of the LO cannot be applied as a subsidiary because they refer to ordinary damage that is not the subject of this **directive** (Todic & Janjatovic, 2018:318-319).

2. Environmental Crime and Environmental Forensicss

In the criminological sense, environmental crime is defined as any act that is contrary to the environmental-legal norm (Kostic, 2009: 175).

Countering a serious global problem such as environmental crime and effective enforcement of environmental regulations requires the involvement of as many relevant actors as possible. This approach is a consequence of the

understanding that environmental protection is primarily achieved through a system of preventive and repressive measures prescribed by law in the area of administrative, civil, economic and financial law, which are mostly implemented by inspection bodies. Criminal protection of the environment is a last resort, but a very effective and necessary option, and the effective implementation of environmental legislation is of vital importance for the suppression and prevention of this type of crime (Lukic, 2009).

Discovering and proving environmental crime requires the cooperation of all competent authorities, the police, the public prosecutor, forensic experts, experts, and environmental protection inspectors. When conducting an investigation, the authority of the procedure (public prosecutor, court or other state authority before which the procedure is conducted), as a rule, requests the help of an expert from the forensic or other profession, who, if necessary, undertakes to find, secure or describe traces, perform the necessary measurements and recording, makes sketches, takes necessary samples for analysis or collects other data (Article 133, paragraph 3 of the Criminal Procedure Code).[1] An expert can also be invited to the investigation if his presence would be useful for providing findings and opinions. Bearing in mind the nature of criminal acts against the environment, the presence of such experts is almost always necessary at the investigation because hardly any of the prosecutors or the police have professional knowledge in the field of engineering, technology, chemistry, mechanical engineering, chemistry, biology, veterinary medicine, etc. to the extent that he would be able to conduct an investigation independently. The presence of environmental protection inspectors during investigations is also of great importance because they have all the necessary professional knowledge in order to indicate to the police and the prosecutor in which direction to reveal evidence, which documents to examine, where there would be traces of a criminal act, etc.] (Vuckovic et al., 2022:54).

Inspection bodies that provide professional assistance in the field, carry out sampling (water, soil or other) independently or by hiring reference laboratories that have appropriate licenses for conducting expertise, or measurements (air pollution) and deliver the obtained results to police officers or the prosecutor's office for further action. Police officers carry out operational tactical measures and actions and evidence actions provided for in the Code of Criminal Procedure, and if necessary, for certain types of analysis, they can engage the National Center for Criminal Forensics, which is qualified to perform forensic expertise and provide material evidence for proving criminal acts. The organizational unit of the Directorate of Police and Police Administration consists of the Directorate of Criminal Police, which includes the National Center for Criminal Forensics and the Unit for Suppression of Environmental Crime and Environmental Protection. The Unit for Suppression of Environmental Crime and Environmental Protection

1 *Official Gazette of the Republic of Serbia No.* 72/11, 101/11, 121/12, 32/13, 45/13, 55/14, 35/19, 27/21 i 62/21

monitors, analyzes and reports on the state, movement and forms of economic crime in the field of ecology and environmental protection. Directs, coordinates and controls the line of work of the criminal police in regional police administrations in the field of environmental crime. It provides professional assistance and is directly involved in solving the most serious and complex crimes. Inspects and controls the implementation of work plans and reports on the work of organizational units of the criminal police in police administrations with the aim of suppressing crime in the field of ecology.[1]

The application of environmental regulations is an important factor in environmental protection and reduction of environmental damage, and this is achieved through the work of competent authorities. The role of the police in environmental protection depends on specific circumstances, but the police can be considered a potentially important factor in controlling compliance with regulations in the field of environmental protection, because there are usually a much larger number of authorized officials employed by the police than environmental protection inspectors in a certain area. However, the police have numerous tasks within their scope of work, in the sense of preventive and repressive activity in connection with criminal acts in a society, and compliance with environmental regulations is not a priority in the work of the police in principle, as long as the elements of the act are not acquired in that violation of a punishable offense under the penal regulations of a country (Lukic & Pisaric, 2012: 231).

The inspector responsible for the environment may, within the limits of his authority, file criminal charges with the competent authority if a criminal offence was committed. Criminal offences in the domain of the environmental protection are defined in Chapter XXIV of the Criminal Code.[2] The Criminal Code of the Republic of Serbia recognizes the environment as a protective object, so this law prescribes eighteen criminal acts, as well as criminal sanctions for the execution of these criminal acts, ranging from fines to imprisonment.

2.1 Access to Justice Within Aarhus Convention

The Aarhus Convention was concluded on June 25, 1998 at the fourth ministerial conference "Environment for Europe" (in the city of Aarhus, Denmark) within the activities of the United Nations Economic Commission for Europe, and entered into force on October 30, 2001. The Aarhus Convention establishes specific obligations of member states concerning three groups of issues: access to environmental information, public participation in environmental decision-making, and access to justice in environmental matters, which constitute the three pillars of

[1] Ministry of Internal Affairs, Informator o radu, the Unit for the Suppression of Environmental Crime and Environmental Protection, https://informator.poverenik.rs/informator?org=v2yHFESmGTAMAfXF5&ch=B7e85r4rMtMRMyzb7, 17.09.2023.

[2] *Official Gazette of the Republic of Serbia No.* 85/05, 88/05, 107/05, 72/09, 111/09, 121/12, 104/13, 108/14, 94/16 and 35/19

the Aarhus Convention. The Republic of Serbia ratified the Aarhus Convention in 2009. godine and acceded to the Aarhus Convention on July 31st, 2009.

3. Access to Justice Cases Related to Environmental Criminality and Environmental Forensics

3.1 The case of hazardous waste in Pancevo

The police discovered that there was a large amount of hazardous waste at three locations in the city of Pancevo, and the judge issued an order to search the apartment and other premises at all three locations. It turned out that the locations as well as the houses or other premises at those locations belonged to the owner of the company who had the necessary permits for waste treatment but not for storing hazardous waste at the locations where it was found, nor could anyone present at the investigation point to the origin of the waste that was found, as well as how long it was there because no documentation existed for this waste.

An investigation was carried out by the police and the public prosecutor and the investigation was attended by experts from the city's public health institute who sampled the substances found at these locations. Considering the complexity of the investigation, as well as a large amount of waste found, environmental protection inspectors were also present and they suggested which substances to look for and also assisted in the detection of potentially hazardous waste. After the sampling had taken place, the prosecutor ordered an expert examination of the substances found at the locations. Based on the data provided by the environmental protection inspectors who acted as representatives of the Ministry of Environmental Protection, it was established that the suspect had a permit to collect and transport hazardous waste and also to treat hazardous waste in a mobile facility on the territory of the Republic of Serbia, issued by the competent Ministry but he did not have a permit to store hazardous waste at the locations where the waste was found, nor was he allowed to treat that waste at these locations, considering that there was no permit for the storage of hazardous waste at these locations. The expert examination found that the defendant stored about 77,100 kg and 7,300 liters of hazardous waste at all three locations. After the completion of the investigation and the collected evidence, a criminal complaint was submitted to the Basic Public Prosecutor's Office in Pancevo, after receiving it and observation by the prosecutor, the suspected owner of the company whose waste was found in this area was invited to present his defense before the prosecutor, i.e. to be heard in his capacity the suspect. After the investigation had been completed and the evidence collected, an indictment was submitted to the Primary Court against the defendant for the criminal offense of transporting dangerous substances to Serbia and illegal processing, disposal, and storage of dangerous substances as per Article 266 paragraph 1 of the Criminal Code. The proceedings concluded with a first-instance verdict in which the defendant was found guilty of the criminal offense charged against him and was sentenced to two years in prison and a fine of 500,000.00

dinars, and he was ordered to confiscate his property of found waste and in the sense of Art. 87 paragraph 3 of the Criminal Code, the court ordered the destruction of this waste. The prosecution appealed this verdict because it requested a stricter prison sentence, i.e. a four-year sentence, and the defendant also filed an appeal through the defense attorney, requesting an acquittal. The High Court issued a verdict that changed the decision of the first-instance court only concerning the sentence of the way that the convicted person was sentenced to a prison sentence of one year and a fine of RSD 500,000.00. The time spent in custody was included in the prison sentence (Vuckovic et al., 2022: 56-60).

3.2 The case of Mali Pek River pollution

In March 2021, there was a public outcry over the pollution of the Mali Pek River, which appeared murky, red, coppery, and green due to the activities of the Serbia Zijin Copper Company. After the complaints of a large number of citizens, the civil society organization „Regulatory Institute for Renewable Energy and the Environment" (RERI) hired the Institute for Mining and Metallurgy Bor, which carried out the sampling of silt from the Mali Pek River. The sampling results showed that the sludge was extremely polluted due to high concentrations of pollutants: copper was 17 times higher than the recommended amount, arsenic was 3.5 times higher than the recommended amount, as well as the lead was almost 2 times higher than recommended. Also, to determine the pollution of Mali Pek, RERI invited the Institute for Public Health Timok, which, upon request, provided environmental expertise and took samples of surface water and wastewater. Sampling was carried out at 3 locations with the aim of proving that the pollution can only originate from the illegal activities of the Serbia Zijin Copper company. The results of surface water and wastewater tests downstream from the mine showed multiple exceeding-of-limit values of polluting substances. Due to all of the above, RERI filed criminal charges in May 2021 due to the existence of a well-founded suspicion that as a result of illegal operations by the company Zijin Copper, environmental pollution occurred as per Article 260, paragraph 1 of the Criminal Code of the Republic of Serbia, and proposed to the prosecutor's office to initiate proceedings against the suspects as soon as possible. Acting on RERI's criminal charges, and based on the evidence and reports/findings it submitted, the Public Prosecutor's Office in Negotin issued an order in April 2022 to postpone the criminal prosecution against Zijin Copper, as well as the responsible person Jian Ximing -a, due to the criminal offense of environmental pollution and ordered them to pay the amount of RSD 1,000,000.00 for humanitarian or other public purposes. Specifically as per Article 283, paragraph 1 of the Code of Criminal Procedure, the public prosecutor can postpone criminal prosecution for criminal offenses for which a fine or a prison sentence of up to 5 years is prescribed, if the suspect accepts one of the obligations prescribed by the same law, such as a monetary payment for humanitarian or other public purposes.

If the suspects do not pay the specified amount by the deadline, the prosecutor's office will initiate criminal prosecution.[1]

4. Problems, Challenges, and Dilemma in the Implementation of Access to Justice in the Field of Environmental Criminality

According to data from the judicial statistics in the Republic of Serbia, we have a very small number of reported criminal acts against the environment and a very small number of indictments against the perpetrators of those acts at the national level. During 2020, the criminal offense of forest theft dominates the structure of reported crimes, while the number of reports against perpetrators of the criminal offense of environmental pollution is very small (a total of 20 reports and only 13 against known criminals). It is worrisome that only 379 cases were indicted, of which the largest number (302) was in cases against perpetrators of the criminal offense of forest theft (Kostic, 2023).

For criminal offense against the environment in Serbia, fines, conditional sentences, and much less often prison sentences, or some of the security measures that can be a particularly useful form of punishing legal entities, such as banning certain registered activities or jobs, confiscation of objects and public publication of the judgment (Gajinov, 2011: 80).

When conducting proceedings for environmental crimes, our judicial authorities today face the problem of proving the guilt of polluters through expert testimony (Vig & Gajinov, 2011: 80) as well as difficulties in gathering evidence during investigative and criminal proceedings (Stopic et al., 2009: 55).

Also, statistical data compared to daily media reports and the activities of environmental associations confirm that the essential problems in the process of successfully suppressing environmental crime are first of all late prevention, that is, reacting only when the problem is found in the courtroom. Trials last several years, there is a problem in the frequent lack of evidence, expensive and complicated expert reports, which are rarely conducted on the spot, and lack of objectivity, and insufficient expertise of the persons conducting these procedures, as well as the need for radical institutional reforms. All of these are the reasons that indicate why there is a small number of reports for criminal offenses against the environment, as well as a small number of cases that have been completed and where a conviction has been pronounced (Gajinov & Vig, 2012: 315).

The main problem in the prosecution of either criminal acts or economic offenses in the field of environmental protection is in the insufficiently clearly defined legislation in the field of environmental protection, in the insufficiently clear delimitation of the powers of all actors who are responsible for protecting the environment (inspection authorities at all levels such as and the role of the local

[1] According to RERI's criminal complaint, Zijin Copper and the company's director were fined one million dinars for polluting the Mali Pek River, *https://reri.org.rs/po-krivicnoj-prijavi-reri-ja-zijin-copper-i-direktor-kompanije-kaznjeni-sa-milion-dinara-zbog-zagadjenja-reke-mali-pek/,* 29.09.2023.

communal militia). Uniting the work of all stakeholders must become a priority in work, in order to achieve the goal of a healthy environment, i.e. protection of human rights, as well as consideration of the position of civil associations and initiatives, because there is a need to give greater rights and importance considering that they are the protectors of collective interests, namely those ecological associations whose only basis and role is the protection of the general - public interest in the protection environment and in criminal proceedings (Association of Public Prosecutors and Deputy Public Prosecutors of Serbia, 2021: 10).

5. Conclusion

Given the absence of cases of compensation for damages in accordance with Directive 2004/35EC, i.e. the failure to adopt the Law on Liability of Environmental Damage that would transpose the said directive, based on the existing cases of punishment for criminal acts in the field of environmental protection, it can be concluded that the penalties are small, do not lead to criminal protection of the environment or to the improvement of nature protection. It is necessary to introduce a regime of compensation for damage caused to the environment, that is, to implement remediation measures, that is, to remove damage caused to the environment at the financial burden of the polluters who caused them. The existing legal framework and the practice of implementing criminal environmental protection do not contribute to adequate environmental protection because the fines are low and it is in the polluters' interest to pay them and continue with further endangering the environment.

In addition to the tightening of sanctions for environmental crimes, a compensation regime should be established following Directive 2004/35EC, that is, the Law on Liability of Environmental Damage should be adopted, in which the costs of eliminating or preventing the occurrence of environmental damage would be borne by polluters.

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