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Environmental human rights and the protection of the environment through
criminal law in the light of recent developments**

Abstract

In the history of the right to a safe, clean, healthy and sustainable environment and its recognition, 2021 marked a milestone. To admit a new generation of human rights, in the UN, the Human Rights Council dealt with the matter of human rights and the environment. Considering the resolution 48/13, it can make the progressive legal accepts stronger at international level. Within the Council of Europe framework, an additional protocol to the European Convention on Human Rights concerning the right to a healthy environment was drafted to admit a new generation of human rights, which is an integral part of Recommendation 2211 (2021). Furthermore also in 2021, the European Commission prepared a Proposal for a Directive on the protection of the environment through criminal law and replacing Directive 2008/99/EC. The drafted Directive is a part of the EU new legislative initiatives.

Keywords: connection between human rights and a healthy environment, environmental human rights, initiatives in the field of the right to a safe, clean, healthy and sustainable environment, proposal for replacing Directive 2008/99/EC.

1. Introduction

Several countries recognize and protect the right to a healthy environment through their constitutions, national laws or ratification of international instruments. In Hungary, the right to a healthy environment was also protected in the Constitution (18. §).¹ According to Article XXI (1) of the Hungarian Fundamental Law, “Hungary recognizes and enforces the right of everyone to a healthy environment.” It has already been declared in the ‘Establishment’ part of the Basic Law that agricultural land, forests and water resources, biodiversity, especially native plant and animal species, and cultural values are the common heritage of the nation, whose protection, maintenance and preserving for the next generation is the responsibility of the state and everyone [Article P of the Fundamental Law of Hungary].²

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¹ The Constitution was in force until 31 December 2011.

² Fundamental Law Hungary is effective from January 1, 2012.



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One of the key objectives of the Decision of the European Parliament and of the Council on the General Environment Action Programme of the European Union for the period up to 2030 is: *“A healthy environment underpins the well-being of all people and is an environment in which biodiversity is conserved, ecosystems thrive, and nature is protected and restored, leading to increased resilience to climate change, weather- and climate-related disasters and other environmental risks.”*³

Environmental human rights are first recognized by environmental law rather than human rights law at the international level.⁴ The year 2021 marked a milestone in the right to a safe, clean, healthy and sustainable environment and its recognition.

2. ‘Greening’ of human rights, environmental human rights and advanced results in 2021

The connection between human rights and a healthy environment has existed since the start of the environmental movement. Fifty years ago, the United Nations Conference on the Human Environment was organized in Stockholm in 1972. The Governments adopted the Stockholm Declaration⁵ in which it is stated in the first paragraph, that every human being *“has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being”* and bears a *“solemn responsibility to protect and improve the environment for present and future generations.”* Furthermore, it declares that *“both aspects of man’s environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights – even the right to life itself.”* Since that time, the right to a healthy environment has gained widespread public and legal recognition across the world.

Human rights are the starting point in this milestone international document.⁶ The vision of ‘environment as a human rights prerequisite’ traces its roots back to the Stockholm Declaration, the first formal international law recognition of the links between environmental protection and human rights. Since the Stockholm Conference in 1972, the relationship between human rights and the environment has developed along the lines of the ‘environment as a precondition’ and the ‘human rights as a tool’ approach.⁷

Twenty years later, in 1992, at the UN World Conference on Environment and Development in Rio de Janeiro, the central approach to environmental protection was ‘sustainable development’, but the Principle No. 1 of the Rio Declaration is an approach similar to our topic: *“People are at the heart of sustainable development. They have the right to live a healthy and productive life in harmony with nature.”*⁸

³ Decision (EU) 2022/591 of the European Parliament and of the Council of 6 April 2022 on a General Union Environment Action Programme to 2030, Article 2 (1).

⁴ Akyüz 2021, 223.

⁵ Declaration on the Human Environment, Adopted by the United Nations Conference on the Human Environment, Stockholm, 16 June 1972.

⁶ Bándi (n.d.).

⁷ Bratspies 2015, 52.

⁸ Rio Declaration Environment and Development, 12 August 1992.

States have entered into agreements on many international environmental problems, including climate change, ozone depletion, transboundary air pollution, marine pollution and the conservation of biodiversity.⁹

Instead of considering environmental protection as a precondition for human rights, the relationship between environmental protection and human rights was underlined.¹⁰ *Bratspies* also underlines the followings: this ‘human rights as tools’ approach also underscores the environmental dimensions of substantive human rights like the right to life and the right to health. There is no question that the realization of many well-established human rights is jeopardized by pollution, environmental degradation, and climate change.¹¹

Akyüz’s opinion is similar: environmental human rights are based on the relationship between the environment and human rights.¹² The author differentiate among four types of human rights in environmental matters: firstly the right to safe environment, secondly the reinterpretation of existing human rights which means that internationally recognized human rights already require safe environment, thirdly the civil and political rights including freedom of expression, right to association and right to assembly and the last one is procedural rights including right to access to information, right to participation in decision making process and right to access to justice.¹³ In his opinion the 1992 Rio Declaration reaffirmed the 1972 Stockholm Declaration and sought to build on it but there are differences between the two declarations. For instance, the principle 10 of the Rio declaration is the unique in that it defines and fosters procedural environmental rights.¹⁴

2.1. United Nations

For decades researchers, lawyers and politicians have explored the questions of the human right to a healthy environment at both international and European level. Within the UN framework, the Human Rights Council (UNHRC) dealt with the matter of human rights and the environment. The notion of the interdependency of human rights and the environment is being advanced at the international level under the mandate of the UN Special Rapporteur on Human Rights and the Environment (the ‘Special Rapporteur’), from 2012.¹⁵

⁹ Human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment. Note by the Secretary-General. United Nations A/73/188, 2018, 8.

¹⁰ *Bratspies* 2015, 54.

¹¹ *Bratspies* 2015, 54–55.

¹² *Akyüz* 2021, 218.

¹³ *Akyüz* 2021, 218.

¹⁴ *Akyüz* 2021, 220.

¹⁵ Statement on the Application of the Business Responsibility to Respect Human Rights to Environmental Human Rights Abuses. Report by the Business and Human Rights Working Group, May 28, 2021, point I.

At that time the Human Rights Council established the mandate for the independent expert on human rights and the environment.¹⁶

Researchers have explored the potential merits and risks of a formal, self-standing human right to a healthy environment for decades.¹⁷ Especially international bodies have recognized the link between human rights and a healthy environment and that environmental harms can be tantamount to human rights abuses.

Following the Human Rights Council Resolution 37/8,¹⁸ the Secretary General has transmitted to the General Assembly the Special Rapporteur's report on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment¹⁹. According to this UN document of A/73/188, the time has come for the United Nations to formally recognize the human right to a safe, clean, healthy and sustainable environment, or, more simply, the human right to a healthy environment²⁰. It is important, the understanding of the interdependency of human rights and the environment has led to the development of a human rights-based approach. The relationship between human rights and the environment has evolved rapidly. The greening of well-established human rights, including the rights to life, health, food, water, housing, culture, development, property and home and private life, has contributed to improvements in the health and well-being of people across the world.²¹

On 8 October 2021, the United Nations Human Rights Council recognized for the first time that having a clean, healthy and sustainable environment is a human right. Ahead of Human Rights Day on 10 December and some weeks before the UN Climate Change Conference, COP 26, the Human Rights Council adopted Resolution 48/13 on the human right to a clean, healthy and sustainable environment.²²

According to the resolution, access to a clean, healthy and sustainable environment is a fundamental human right. Most of UN member states already recognize the right to a healthy environment through national law.

¹⁶ John Knox was appointed the first Independent Expert on human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment. His mandate was extended in March 2015 as a Special Rapporteur. Mr. David R. Boyd was appointed the Special Rapporteur in March 2018 for three years and in March 2021 the Human Rights Council renewed his mandate for another three years.

¹⁷ Webster & Morgera 2021, 55.

¹⁸ Resolution adopted by the Human Rights Council on 22 March 2018, 37/8: Human rights and the environment. Before it 16 Framework principles on human rights and the environment were presented to the Human Rights Council in March 2018 at its thirty-seventh session. These framework principles set out basic obligations of States under human rights law as they relate to the enjoyment of a safe, clean, healthy and sustainable environment. They reflect the application of existing human rights obligations in the environmental context.

¹⁹ Human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment A/73/188, 19 July 2018.

²⁰ A/73/188, point 37.

²¹ A/73/188, point 53.

²² Resolution 48/13: The human right to a clean, healthy and sustainable environment, A/HRC/RES/48/13.

Considering the value of resolution 48/13, it can make the progressive legal accepts stronger at international level. This resolution reaffirmed that all human rights are universal, indivisible, interdependent and interrelated.²³ Resolution also underlined the sustainable development and its three dimensions: social, economic and environmental.²⁴

At the same day, the Human Rights Council also adopted Resolution 48/14 on Mandate of the Special Rapporteur on the promotion and protection of human rights in the context of climate change.²⁵ Through this second resolution, the Human Rights Council increased its focus on the human rights impacts of climate change and established the Special Rapporteur position dedicated specifically to that issue. This other resolution acknowledges the damage inflicted by climate change and environmental destruction on millions of people across the world. It was also described ‘the triple planetary threats’ of climate change, pollution and nature loss as the greatest human rights challenge of our era.

The ongoing United Nations draft treaty on regulating the activities of transnational corporations and other business enterprises is in the making. In other words, business and human rights, concerning corporate human rights abuses associated with environmental harms are in the focus of attention.²⁶

The Aarhus Convention (adopted in 1998 and entered into force in 2001)²⁷ takes procedural environmental rights a step further.

2.2. Council of Europe

Based on texts adopted by the Parliamentary Assembly of the Council of Europe and the case-law of the European Court of Human Rights, the Committee of Ministers has entrusted the Steering Committee for Human rights (CDDH) with elaborating a manual on human rights and the environment. The Committee of Ministers approved the publication of Manual on Human Rights and the environment (2006)²⁸ and a revised manual has been republished in 2012.²⁹

In the meantime, Recommendation 1885 (2009)³⁰ on ‘Drafting an additional protocol to the European Convention on Human Rights concerning the right to a healthy environment’ was prepared by the Parliamentary Assembly.

²³ Resolution 48/13, Preamble.

²⁴ Resolution 48/13, Preamble.

²⁵ Resolution 48/14: Mandate of the Special Rapporteur on the promotion and protection of human rights in the context of climate change, A/HRC/RES/48/14.

²⁶ Hartmann & Savaresi 2021, 27–46.

²⁷ Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Aarhus, Denmark, 25 June 1998.

²⁸ Manual on human rights and the environment – Principles emerging from the case-law of the European Court of Human Rights, 2006.

²⁹ Manual on human rights and the environment (2nd edn.), 2012.

³⁰ PACE – Recommendation 1885 (2009) – Drafting an additional protocol to the European Convention on Human Rights concerning the right to a healthy environment.

The Parliamentary Assembly of the Council of Europe, referring to Resolution 2396 (2021)³¹ on Anchoring the right to a healthy environment: need for enhanced action by the Council of Europe, reiterated the need to admit a new generation of human rights. In Recommendation 2211 (2021)³² the Assembly expressed anxieties because of the rate and extent of environmental degradation, the loss of biodiversity and the climate crisis, which has a direct impact on human health, dignity and life. The Assembly asked the Committee of Ministers develop an additional protocol to the European Convention on Human Rights (ECHR) on the right to a safe, clean, healthy and sustainable environment, based on terminology used by the United Nations. At the same time, they proposed the draft text for the protocol, which is an integral part of Recommendation 2211 (2021).³³

According to the Recommendation, the right to a safe, clean, healthy and sustainable environment requires going beyond an approach based on individual rights alone and defines the right to a healthy environment as an autonomous right of humanity.³⁴

For the purpose of the additional protocol ‘the right to a safe, clean, healthy and sustainable environment’ means the right of present and future generations to live in a non-degraded, viable and decent environment that is conducive to their health, development and well-being.³⁵

The draft text of the additional protocol to the ECHR enshrines an enforceable right to ‘a safe, clean, healthy and sustainable environment’. Members of the Assembly have agreed on the following general principles, in interest of conducting: (a) principle of transgenerational responsibility, equity and solidarity (Article 2); (b) principle of environmental non-discrimination (Article 3); (c) principle of prevention, precaution, non-regression and in dubio natura (Article 4).

Finally, the substantive and procedural rights are also included. The adoption of the proposed additional protocol would give the European Court of Human Rights a non-disputable base for decisions in connection with human rights violations arising from environment-related adverse acts.

2.3. European Union

The European Parliament resolution of 19 May 2021 on the effects of climate change on human rights and the role of environmental defenders on this matter,³⁶ among others, points out the Article 37 of the Charter, which commits the EU to

³¹ Resolution 2396 (2021): Anchoring the right to a healthy environment: need for enhanced action by the Council of Europe.

³² Parliamentary Assembly Recommendation 2211(2021), Council of Europe. Text adopted by the Assembly on 29 September 2021 (27th sitting).

³³ Appendix – The proposed text for an additional protocol to the European convention on Human Rights, concerning the right to a safe, clean, healthy and sustainable environment.

³⁴ Recommendation 2211 (2021), Preamble.

³⁵ Recommendation 2211 (2021), Article 1.

³⁶ The European Parliament resolution of 19 May 2021 on the effects of climate change on human rights and the role of environmental defenders on this matter (2020/2134(INI)).

integrating a high level of environmental protection and improvement of the quality of the environment into its policies and resolution on the European Green Deal (2020).

At the same time this European Parliament resolution refers to the fact that UN is calling for global recognition of the right to a healthy and safe environment as universal right,³⁷ the Paris Agreements the first international treaty to explicitly recognize the link between climate action and human rights³⁸ and the European Court of Human Rights has clearly established that various types of environmental degradation can result in violations of substantive human rights, such as the rights to life, private and family life, and the peaceful enjoyment of the home, and prohibition of inhuman and degrading treatment.³⁹

This resolution recalls the legal obligation to respect the right to a safe, clean, healthy and sustainable environment,⁴⁰ and calls on the Union and Member States to support, at the next UN General Assembly, the global recognition of the right to live in a safe, clean, healthy and sustainable environment as a human right.⁴¹

3. Background and innovations of the new draft directive

In 1998, the Council of Europe adopted the Convention on the Protection of the Environment through Criminal Law.⁴² Twenty years later, in 2008, under the auspices of the European Union, Directive 2008/99/EC on the protection of the environment through criminal law (Environmental Crime Directive)⁴³ was also adopted on the legal basis of Article 175 of the EC Treaty (now Article 192 TFEU). The period for transposing the Directive into national law expired in December 2010. Environmental crime is among the European Union's central concerns.⁴⁴

The protection of the environment through criminal law was necessary to express a higher level of social disapproval than what can be achieved by existing administrative or civil law, and the Directive was adopted as a response. The Directive is the main European instrument for protecting the environment through criminal law.⁴⁵

³⁷ The European Parliament resolution 2020/2134(INI), point C.

³⁸ The European Parliament resolution 2020/2134(INI), point J.

³⁹ The European Parliament resolution 2020/2134(INI), point K.

⁴⁰ The European Parliament resolution 2020/2134(INI), point 5.

⁴¹ The European Parliament resolution 2020/2134(INI), point 7.

⁴² Convention on the Protection of the Environment through Criminal Law Strasbourg, 4.XI.1998, Council of Europe, European Treaty Series – No. 172.

⁴³ Directive 2008/99/EC of the European Parliament and of the Council on the protection of the environment through criminal law (Environmental Crime Directive) of 19 November 2008.

⁴⁴ Zeitler 2006, 255.

⁴⁵ Commission Staff Working Document, Evaluation of the Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law, SWD(2020) 259 final, point 1.

3.1. Previous history in the European Union

During last years the European Union has strengthened the activities in this field. By 2015 the European Union recognized the link between environmental crime and organized crime, and between environmental crime, money laundering and terrorist financing. Next year the Council of the European Union invited the Commission to monitor the effectiveness of EU legislation in the field of countering environmental crime.⁴⁶ In addition to this, in 2016, the EU Action Plan to combat wildlife trafficking set out the need to review the EU legislative framework on environmental crime.⁴⁷ According to the Council Conclusions on setting the EU's priorities for the fight against organized and serious international crime between 2018 and 2021,⁴⁸ the Council recognized the need to address environmental crime, especially illegal waste exports and wildlife trafficking, as priorities in the EU. Furthermore, in 2018 the Commission adopted an EU action plan to improve environmental compliance and governance.⁴⁹ Next year the European Green Deal⁵⁰ was adopted.

The Evaluation of the Directive 2008/99/EC by the Commission covers all Member States including the UK and years from 2011 to 2019.⁵¹ According to this Evaluation, the environmental crimes are the fourth largest criminal activity in the world after drug smuggling, counterfeiting and human trafficking. Environmental offence is often committed by organized crime groups and networks operating transnationally. Some forms of environmental crime, such as illegal wildlife trafficking, can even be a source of funding for terrorist and related activities. The Commission identified the drivers: (a) the opportunity for significant profits, (b) a low risk of detection, and (c) growing international trade.⁵²

On 15 December 2021, the Commission published its long-awaited Proposal for a new directive on the protection of the environment through criminal law,⁵³ thereby contributing to the European Green Deal's overall goals.

⁴⁶ Council Conclusions on Countering Environmental Crime of December 2016, Council of the European Union, 12 December 2016, No.15412/16.

⁴⁷ EU Action Plan against Wildlife Trafficking, European Commission, 2016., (COM(2016) 87 final).

⁴⁸ Council conclusions on setting the EU's priorities for the fight against organised and serious international crime between 2018 and 2021 - Council conclusions (18 May 2017),document 9450/17 of 2017-05-19.

⁴⁹ EU actions to improve environmental compliance and governance, COM(2018) 10 final.

⁵⁰ The European Green Deal, 11.12.2019, COM(2019) 640 final.

⁵¹ Commission Staff Working Document, Evaluation of the Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law, SWD(2020) 259 final.

⁵² Evaluation of the Directive 2008/99/EC, Introduction.

⁵³ Proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law and replacing Directive 2008/99/EC, COM(2021) 851 final.

3.2. Proposal for a Directive on the protection of the environment through criminal law and replacing Directive 2008/99/EC

The environmental crimes are evolving, the involvement of legal persons and number of organized crimes with a cross-border dimension are increasing, too. The key findings for relevance of the Evaluation: there are large differences between EU Member States concerning the criminalization of environmental offences, and the level of available sanctions is often considered too lenient.⁵⁴ According to the Commission the Directive did not have much effect, because over the past years the number of environmental crime cases successfully investigated and sentenced remained very low, there were considerable enforcement gaps, there were no overarching national strategies to combat environmental crime involving all levels of the enforcement chain and a multidisciplinary approach. Based on the Evaluation findings, the Commission decided to revise the Directive and it was proposed to replace Directive 2008/99/EC.⁵⁵

According to Article 3(3) of the Treaty on European Union (TEU) and Article 191 of the Treaty on the Functioning of the European Union (TFEU), the Union is committed to ensuring a high level of protection and improvement of the quality of the environment.⁵⁶

Criminal law is one part of a comprehensive EU strategy to protect and improve the status of the environment, a priority for the European Commission. Criminal law measures come in as a last resort when other measures (environmental indicators, e.g. the degree of air pollution or biodiversity) have not sufficed to ensure compliance.

3.2.1. The criminalisation of environmental crimes

In the original Directive, 9 environmental offences comprise a broad range of illicit activities such as the illegal emission or discharge of substances into air, water or soil, illegal trade in wildlife, illegal trade in ozone-depleting substances and the illegal shipment or dumping of waste, as listed in the 72 pieces of environmental legislation contained in the two annexes to the Directive.⁵⁷

The legal basis for the proposed Directive is Article 83(2) TFEU. It sets out the EU's competence to establish minimum rules with regard to the definition of criminal offences and sanctions in EU policy areas which have been subject to harmonisation measures, if this is necessary for effective enforcement. The Proposal defines the scope of the criminal offences to cover all relevant conduct while limiting it to what is necessary and proportionate.⁵⁸ Some of the offences are from the current Directive, some are amended and clarified versions of existing ones, and some are new offences.

⁵⁴ Evaluation of the Directive 2008/99/EC, Introduction.

⁵⁵ Proposal for a Directive, Explanatory memorandum, point 1.

⁵⁶ Proposal for a Directive, Preamble (1).

⁵⁷ Evaluation of the Directive 2008/99/EC, Introduction.

⁵⁸ Proposal for a Directive, Explanatory memorandum, point 2.

The proposed Directive includes new environmental offence categories to the extent required by the underlying environmental legislation. Additional categories of offences based on the most serious breaches of EU environmental law should be added (i.e. offence categories currently not covered by the Directive): (a) illegal timber trade; (b) illegal ship recycling; (c) illegal water abstraction causing substantial damage to water resources; (d) serious breaches of EU chemicals legislation causing substantial damage to the environment or human health; (e) placement on the market of products which, in breach of mandatory requirements, cause substantial damage to the environment or people's health because of the product's use on a larger scale; (f) source discharge of polluting substances from ships; (g) serious breaches of legislation on invasive alien species with Union concern; (h) serious circumvention of requirements to get a development consent and to do environmental impact assessment causing substantial damage; (i) serious breaches related to dealing with fluorinated greenhouse gases.⁵⁹

In the Proposal for a Directive, the Article 3 (1) contains the detailed common minimum rules on definition of 18 environmental criminal offences (point a)-r)). These conducts have a potential high risk to human health and the environment and can lead to particularly serious negative impacts on the environment.

The Draft Directive also clarifies existing offences, with express references in the definition of the offence to other EU directives. Summing up, the Proposal defines environmental offences for future criminalizing.

Member States shall ensure that this listed conduct constitutes a criminal offence when it is unlawful and committed intentionally.

The Article 2 provision contains definitions of terms used in the Directive, including a refined definition of 'unlawfulness' for the purpose of defining environmental criminal offences. 'Unlawful' conduct means infringement one of the followings: (a) the relevant union legislation, or (b) a law, an administrative regulation of a Member State or a decision taken by a competent authority of a Member State that gives effect to the Union legislation referred to in point (a). The conduct shall be deemed unlawful even if carried out under an authorization by a competent authority in a Member State when the authorization was obtained fraudulently or by corruption, extortion or coercion.

In the framework of definitions there are further terms: 'habitat within a protected site', 'legal person', 'public concerned (persons)' and 'victim'.

As regards victim, nature cannot represent itself in the criminal proceedings. For the purpose of effective enforcement members of the public concerned, should have the possibility to act on behalf of the environment as a public good (within the scope of the Member States' legal framework and subject to the relevant procedural rules).⁶⁰

Related to this is Article 14, which provision concerns procedural rights to participate in criminal proceedings. It should be granted to the public concerned as set out in Article 2.

⁵⁹ Stepping up the fight against environmental crime, COM(2021) 814 final.

⁶⁰ As defined in this Directive taking into account Articles 2(5) and 9(3) of the Aarhus Convention. In: Proposal for a Directive, Preamble (26).

In the light of Article 3 (2), Member States shall ensure that the conduct referred to in paragraph 1, points (a), (b), (c), (d), (e), (f), (h), (i), (j), (k), (m), (n), (p) (ii), (q), (r) also constitutes a criminal offence, when committed with at least serious negligence. With regard to the inclusion of negligent conduct within the scope of offences, it is important to stress the extent of the reliance of EU environmental rules on preventive and precautionary measures. Criminal law is intended to have a deterrent effect from any inclination towards such conducts, for example in order to obtain a financial gain through underinvestment or corner cutting.

Furthermore, terms used in the definition of offences are clarified in that they specify elements that need to be taken into account when investigating, prosecuting and adjudicating criminal offences: in particular, “*the damage or likely damage is substantial*” or “*the activity is likely to cause damage to the quality of air, the quality of soil or the quality of water, or to animals or plants*” and “*the quantity is negligible or non-negligible.*”⁶¹

The Article 4 (1) criminalizes inciting, and aiding and abetting the commission of criminal offences referred to in Article 3(1). Last one means, the offender is criminalized, when makes an attempt to commit certain criminal offences, listed in Article 4 (2).

3.2.2. Sanctions

To address the current shortcomings of the Directive, take account of new developments and trends in environmental crime, the Commission proposed that the new Directive: (a) update and refine the list of criminal offences, including the new categories of environmental crimes, (b) strengthen the provisions on criminal sanctions, (c) recognize and strengthen the enforcement chain, (d) also recognize and strengthen the role of citizens and civil society.⁶²

Going back finalizing of the Directive 2008/99/EC, in the second judgment,⁶³ the *Court of Justice of the European Union* clarified that the definition of types and levels of the criminal penalties does not fall within the Community’s sphere of competence (judgment of 23 October 2007, C-440/05, paragraph 70). This led the Commission to eliminate all references to types and levels of penalties contained in its initial proposal for the Directive. Instead, the adopted final version of the Directive obliged Member States to provide for ‘effective, dissuasive and proportionate’ criminal penalties.⁶⁴

Later, the Lisbon Treaty introduced an explicit legal basis in Article 83(2) TFEU setting out the Union’s competence to establish minimum rules with regard to the definition of criminal offences and sanctions in Union policy areas which have been

⁶¹ Proposal for the Directive, Article 3 (3)–(5).

⁶² Stepping up the fight against environmental crime, 3–4.

⁶³ Regarding the Commission’s appeal to the ECJ for the annulment of the Council Framework Decision 2005/667/JHA of 12 July 2005 on strengthening the criminal-law framework for the enforcement of the law against ship-source pollution (Case C-440/05).

⁶⁴ Evaluation of the Directive 2008/99/EC, 10.

subject to harmonization measures, provided that this is necessary for effective enforcement.⁶⁵

The Directive does not harmonize sanctions, it only contains a general triad that the listed offenses should be punishable by effective, proportionate and dissuasive criminal sanctions.⁶⁶ However, the length of imprisonment and the level of fines for these offenses vary considerably between Member States.⁶⁷ The criminal sanctions (prison sentence, criminal financial penalties, accessory sanctions/confiscation) are difficult to compare as Member States set them in accordance with their national legal traditions, which differ significantly.

According to the preamble of the Proposal, the existing systems of penalties under Directive 2008/99/EC and environmental sectoral law have not been sufficient in all environmental policy area to achieve compliance with Union law for the protection of the environment. Compliance should be strengthened by the availability of criminal penalties, which demonstrate social disapproval of a qualitatively different nature compared to administrative penalties.⁶⁸

The Article 5 (1) of the Proposal (Penalties for natural persons) provides minimum standards to ensure that the offences referred to in Articles 3 (Offences) and Article 4 (Inciting, aiding, abetting and attempt) are punishable by effective, proportionate and dissuasive criminal penalties. In addition, the Proposal requires that Member States introduce specific sanction levels and types for environmental criminal offences. The categorization proposed reflects the seriousness of the offences.

The Draft Directive proposes to set thresholds of maximum penalties for natural persons, with the possibility for Member States to implement tougher sanctions. Paragraph 2, 3, 4 state that certain offences referred to in Article 3, in what cases should be punishable by a maximum term of imprisonment of at least ten years, six years or four years.

Paragraph 5 aims at Member States taking measures to ensure that the offences referred to in Articles 3 and 4 can be subject to additional sanctions and measures to allow for a tailored response to different types of criminal behavior.

Article 6 contains obligations to ensure the liability of legal persons for offences referred to in Articles 3 and 4 where such offences have been committed for their benefit. Article 7 sets out sanctions applicable to legal persons involved in the criminal offences covered by the Proposal. Article 10 provision makes sure that Member States give the opportunity to competent authorities to freeze and confiscate the proceeds derived from offences covered by this proposal. Furthermore, the Article 8 and 9 set out the aggravating and mitigating circumstances to be considered when sanctions are applied.⁶⁹

⁶⁵ Evaluation of the Directive 2008/99/EC, 10.

⁶⁶ 2008/99/EC, Article 5.

⁶⁷ Görgényi 2018, 56–57.

⁶⁸ Proposal for the Directive, Preamble (3).

⁶⁹ Proposal for the Directive, 18.

The Member States's different legal traditions must be taken into account when establishing the types and levels of penalties. Whether a sanctioning system is considered a deterrent depends also on judicial practice and whether high sanction levels provided by national criminal law are systematically imposed, or if the practice is more lenient. The existence of other complementing administrative or civil sanctioning systems and their relation to and interaction with criminal law, enforcement and sanctioning also play a role.⁷⁰

3.2.3. Other provisions

Persons who report irregularities are known as whistleblowers. Potential whistleblowers are often discouraged from reporting their concerns or suspicions for fear of retaliation.⁷¹ Article 13 concerns the protection of persons such as whistleblowers, environmental defenders and others reporting information or providing evidence to an investigation relating to environmental criminal offences.

Provisions on sanctions should be strengthened in order to enhance their deterrent effect as well as the enforcement chain in charge of detecting, investigating, prosecuting and adjudicating environmental criminal offences.⁷² Article 17 aims at enhancing training activities along the enforcement chain to ensure that all parties involved have the necessary specialized skills and abilities to perform their roles effectively. It is need to improve the effectiveness of the enforcement chain in practice (provisions on training, resources, cooperation and coordination).

Article 19 requires Member States to ensure coordination and cooperation at strategic and operational level among all their competent authorities involved in the prevention of and fight against environmental crime. It is very important to improve cross-border cooperation as well.

Article 20 aims at ensuring a strategic approach to combating environmental crime and includes aspects to be addressed by a *national strategy* which will need to be established in each Member State.

4. Some basic issues related to environmental crime

From the beginning, research has focused on where the circles of environmental crime are located in different legal systems, country by country. The dependence of the related criminal law on administrative law is also on the agenda.

4.1. The place to regulate environmental offences

There are different models in each European country. In Poland and Spain, environmental crime is basically covered by penal codes. In Italy, two offenses have been included in the Penal Code since the implementation of Directive 2008/99/EC,

⁷⁰ Evaluation of the Directive 2008/99/EC, 15.

⁷¹ Proposal for the Directive, Preamble (24).

⁷² Proposal for the Directive, Preamble (4).

and from 2015 a new chapter in the Criminal Code includes the environmental offenses. In most countries, environmental crimes are either covered by the Penal Code or the Environmental Code or a special environmental law. In Sweden, the latter two laws specifically contain provisions for the criminal protection of the environment, not the Penal Code. In the UK, for traditional reasons, there is neither a penal code nor an environmental code, so the relevant provisions can be found in different laws.⁷³

4.2. Types of protection of the environment by criminal law and dependence on administrative law

The neuralgic point of environmental criminal law is the issue of dependence on administrative law.⁷⁴ In the field of environmental crime, three possible models can be distinguished, given the relationship between criminal law and administrative law:

(a) In the case of an abstract endangerment,⁷⁵ criminal law typically deals with a breach of an administrative provision (obligation), in the absence of actual harm or threat to the environment. In Italy, environmental criminal law is dominated by abstract threats. In Spain, breaches of administrative rules are an immanent element of environmental crime in all cases. In some jurisdictions, there is criticism of the administrative dependence of environmental criminal law. In this model, the relationship between non-compliance and environmental damage is quite distant. In view of all this, it is common in many jurisdictions to identify a concrete endangerment.

(b) In the case of a concrete endangerment,⁷⁶ the commission of a criminal offense is not limited to a breach of administrative regulations, but a specific threat to the environment is also required. The advantage is that the legislature does not have to focus strictly on breaches of administrative regulations. In terms of air, water or land, these are emissions that threaten the environment. In the German Criminal Code, for example, there is water pollution under Article 324⁷⁷ in the chapter on crimes against the environment. The implementation of Directive 2008/99 / EC on the protection of the environment through criminal law has increased the number of such offenses.

(c) In the case of autonomous offences,⁷⁸ very serious pollution is punished by criminal law provisions. These are cases where the crime would have serious consequences for people's health. The perpetrator will also be penalized if he or she has complied with the conditions set out in the permit. There are examples of autonomous crime in the Spanish Penal Code, enacted in 2010 and amended in 2015. An example of an autonomous crime can also be found in the Convention on the Protection of the Environment through Criminal Law, adopted by the Council of Europe.

⁷³ Faure 2017, 269–270.

⁷⁴ Görgényi 1997, 25–28.

⁷⁵ Faure 2017, 274–276.

⁷⁶ Faure 2017, 276–278.

⁷⁷ StGB 324. §: Gewässerverunreinigung.

⁷⁸ Faure 2017, 278–280.

However, Directive 2008/99 / EC does not provide for this. According to *Michael Faure*, in order to strengthen the protection of the environment through criminal law, irregular emissions should be criminalized rather than disregarding administrative obligations.⁷⁹

5. Final remarks

In 2021 the United Nations Human Rights Council's resolution 48/13 on the right to a safe, clean, healthy and sustainable environment generated important fact for this approach. The recognition of these rights by the Human Rights Council has provided important impetus.

In the Council of Europe, the Committee of Ministers has developed the draft text for the additional protocol to the European Convention on Human Rights on the right to a safe, clean, healthy and sustainable environment, too. It is the part of Recommendation 2211(2021).

The European Union's Biodiversity Strategy to 2030⁸⁰ refers, inter alia, to the Directive on the protection of the environment through criminal law (2008/99/EC) and in the context that the Commission will ensure that it is implemented and enforced more effectively and, where necessary, review these. The Eighth Action Program builds on the European Green Deal,⁸¹ with discipline in support of its environmental and climate policy objectives and following the 'do no harm' principle.

In 2021 the European Commission as the executive body of the European Union published the Proposal for a new directive on the protection of the environment through criminal law. The Proposal is a part of the EU legislative initiatives under the European Green Deal. Among the actions set out in the Commission's 2019 Green Deal was a commitment to step up efforts against environmental crime. However, the environmental ambition of the Green Deal will not be achieved by Europe acting alone. The Commission will also promote action by the EU, its Member States and the international community to step up efforts against environmental crime.

⁷⁹ Faure 2017, 273.

⁸⁰ EU Biodiversity Strategy for 2030: Bringing nature back into our lives, COM/2020/380 final.

⁸¹ The European Green Deal, COM(2019) 640 final.

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