UNIVERSITY OF CRAIOVA
FACULTY OF LAW

RESUME

PhD. DEGREE THESIS

ENVIRONMENT PROTECTION BY MEANS OF CRIMINAL LAW

PhD. COORDINATOR
PhD. Professor Mircea Dutu

PhD. Student
Mihaiela Nemes

CRAIOVA
2015

Resume

The environment protection by means of criminal law is a very significant subject in the current context where we can see that the major problem of environment is the ecological crimes repression inefficiency. Their originality is incontestable and is provided vy the indirect prejudice importance, the amount of synergical effects, the actions' irreversibility, the difficulty to find the liable individuals. Moreover, the doctrine asks itself who is the victim, the human being or the nature and that is why we talk about the ecological damage duality – as by touching the environment, one damages not only the human being, its health, its goods and activities, but also to the environment itself, to its species and ecosystems.

The natural question considering the environment law youth, of its maturity holds a large number of causes introduced by private individuals or collectivities showing an interest to the environment where they are living, the recognition of the purely ecological prejudice, that is totally broken from the economic one, considered a truly legal revolution – the green increase – the so-called durable development defined as national, European and international objective, that is the environment protection by criminal law. The future of the environment law depends on the enactment of an Environment European Code, a Worldwide Code and the creation of the United Nations for environment. We express our hope that all these shall not be created in the far future.

From the permanent repetition of CEDO that the life right represents an unalienable attribute to the human being and represents the supreme right on the human rights' scale, to the dedication of the human right to a health environment, of the environment law principles and the recent effectiveness principle, all indicating the great opening that the national and European environment autorities have in order to solve the environment problems, including the ones resulting from crimes.

We proposed ourselves to discuss the environment protection subject by criminal law in six chapters allowing us to frame the notion in its national, European and international context.

Thus, **Chapter 1**, shall discuss the *right problem as environment protection instrument* as the environment right appeared and developed as consequence of society tasks, depending on the protection needs of different environment elements threatened by the population explosive increase which has brought a series of negative effects on the environment: industrialization development and diversity, urbanism extension by cities number increase and the increase of the existing cities' surface, the agriculture development, especially including many chemical substances, the increase of road, air and naval traffic. All together, they led to the increase of the toxicity level and pollution sources persistence, conditions incurred by the transition from the simple environment protection to the preservation and management need of environment. Amongst the protection measures, the creation of a new law branch is included herein. At the environment law appearance, an important role was played by the international discussions, such as Stockholm Convention from 1972 which rang the alarm on the humanity's future as a result of the environment degradation following the human activities. As for all law rights, the environment law norms appear from the daily reality which needs to be regulated and that reality is the one of a more and more pollutant environment, wherewith the adaptation problem of individuals from the legal, moral, economic point of view for the achievement of a development corresponding to the current needs, without compromising the next generations' possibility to satisfy their own needs. According to this reality, the norms are called to frame legally the individuals' obligation to act today, thinking about the common future of the human kind and to a healthy environment right. Therefore, we analyzed the appearance, the nature and the legal and jurisprudential protection – especially to CEDO and Constitutional Court practice. Analyzing the execution methods and techniques of the environment protection (section 2 of chapter 1), we underlined the need of an appropriate and efficient institutional frame for the national and international environment protection, but also the role of the environment protection particular techniques, of the economic and social activity regulation affecting the environment and the legal liability for acts damaging the environment.

Since only three fundamental forms of legal liability appearing as a result of the legal provisions breaching, id est civil, contravention and criminal liability, we carried out a short analysis of each one of them.

Chapter 2 named **Criminal liability in environment law** develops the general considerations presented in the first chapter relative to the criminal law means, the most severe protection legal instruments and environment preservation. The criminal liability together with the other legal liability forms particular to the environment law represents an important repressive means of environment protection and development. By involving the criminal law in the environment protection, the achievement of one fundamental function is aimed, that is the preventive function (general prevention and particular prevention). The ecological crime is the dangerous action induced by the environment pollution (natural or artificial), the prevention activity disturbance, the decrease or elimination of pollution, endangering the individuals, the animals and the plants' right or causing large national economic damages. The environment crime is a relatively new category within the general framework of crimes which has as result the objective damage of environment quality or the social value endangering. The environment crimes may be commissive or ommissive crimes performed as intention or fault by all means. For all these, we think that the name of 'environment criminal law' may be conventionally given to all juridical and criminal norms, integral part of the special criminal law warranting the execution of durable economic development premises.

Given the fact that the criminal law has an important part in the international and European environment protection, we analyzed one by one: the Convention for environment protection by criminal law, Strasbourg 1998, the Directive 2008/99/EC relative to the environment protection by criminal law and finally, the ecological crimes regulation at international level. Shortly, we analyzed the representative international documents related to: the legal protection of water, atmosphere, legal regimen of products and toxic substances, the mass destruction weapons and substances control, armed conflicts and environment protection problems.

Chapter 3. The environment crime as criminal liability base starts the 2nd Section: Legal framework of environment crime – with a needed crime general analysis. Thus, we shall examine: the notion and features, the object, the subjects, the objective and the subjective parts of environment crime, its particularities. We considered that for the environment crime, the severe variants must be regulated, covering the high danger risk situations, leading to ecocide sizes or interactions with the organized crime manifestations. If such norm finds its place among the national criminal codes, the environment disturbance would probably be eliminated more effectively. Internationally, the analysis of environment crimes severity as facts led to some particular remarks: firstly, such crimes cannot be fought against successfully outside an international cooperation. Secondly, it is important that such fact should be brought before the International Criminal Court specialized on environment protection problems; in absence of such body, they may be fought against only indirectly by internal law. Thirdly, given the severe consequences, the cooperation for cross-border pollution and abroad crimes elimination is highly important. Within the international cooperation directed to the elimination of such behaviors, the national jurisdiction problem plays the highest role. Some of the sure situations may be currently solved as the criminal law may be applied to national and foreign crimes according to the sovereignty principle, such right being limited only by international conventions and uses. Surely, the results obtained in the interest field would be much more spectacular if they are generated by all states efforts or at least the regional assays.

Section 2: The connection between the environment criminal law and the administrative law underlines the commonly admitted facts that is, the environment law is the most linked law branch to the administrative right due to the political police rules and the importance of state. Moreover, the problem of creation and application of environment policy led to the foundation of a particular institution, especially organized to this effect (for example: the environment police). The rules applicable to facts representing contraventions are defined by administrative juridical norms. The current evolution in the

field of environment criminal liability shows that the criminal unlawful was accused and punished initially and then for a significant period strictly depending on the administrative regulation. The criminal provisions were provided in codes or master-laws and / or special norms for the extension and warranty of administrative major prescriptions. The fact that the environment protection requirements are provided by procedures and instruments use (approvals, permits, other) of administrative origin (they become 'regulations' in the Romanian law) makes that the criminal provisions should sanction the administrative obligations (in order to obtain permits or to perform their prescriptions). In such cases, the ecological interests are protected only indirectly or by consequence and the environment crimes are established by the environment administrative authorities.

The last chapter session discusses about the legal entity liability problem starting from the criminal liability background of the legal entity in the Romanian law, continuing with the legal entity as subject of the criminal liability and its conditions, the criminal liability fir environment actions and the applied sanctions. On this occasion, we analyzed the provisions of Law 286/2009 relative to the Criminal Code (where Title VI is designed to criminal liability of legal entity) both independent and compared to the provisions of Law 301/2004 Romanian Criminal Code and other states criminal codes (France, Belgium, Spain, Republic of Moldova).

Chapter 4. Criminal liability for environment action in Romania continues the environment crimes analysis which we separated depending on the affected principle: crimes breaching the decision making precaution principle, crimes affecting the prevention principle of ecological risks and damages cause and crimes affecting the biodiversity preservation principle.

This classification is justified since the Government Emergency Order number 195/2005 relative to the environment protection states at article 1, item 1 "the subject of the present Emergency Order is represented by all juridical regulations relative to the environment protection, object of major interest, based upon the strategical principles and elements leading to the durable development."

We understand that the starting base of the environment protection is represented by the strategical principles and elements and the purpose is the durable development. The principles provided by the frame norme, Article 3 are: a) the environment requirements integration principle in other sectoral politics; b) the decision making precaution principle; c) the preventive action principle; d) the pollutants kept at source principle; e) the 'pollutant agent pays' principle; f) the preservation principle of biodiversity and ecosystems particular to the natural biogeografic frame; g) the natural resources durable use; h) public information and participation to decision making and access to justice in case of environment problems; I) development of international collaboration for environment protection.

Following the analysis of each principle carried out in comparison with the European Union norms, especially the ones within the fundamental treaties: The European Union Treaty and the Treaty relative to the European Union operation, we studied both the crimes within our frame norm and the crimes within the special laws, id est: Law no. 111/1996 relative to the safely performance of nuclear activity; Law no. 211/2011 regarding the waste regime; Law no. 407/2008 relative to the Sylvan Code; Emergency Government Order no. 23/2008 relative to fishing and aquaculture; Law no. 107/1996 of waters.

Chapter 5. The evolution of environment regulations includes the analysis of environment regulations from the Criminal Code, special norms and Directive no. 2008/99 of 19th November 2008 relative to the environment protection by means of criminal law. We showed that for environment protection, the regulations started with criminal norms, being necessary as consequence of industrial revolution from the 19th century in the European countries. Currently, the Criminal Code includes regulations which may generate the environment protection: article 345 incriminating the crime of non-complying with the nuclear or other radioactive materials rules, article 346 incriminating the crime of non-complying with the explosive materials regimen, article 355 incriminating the crime of diseases spread to animals or plants, article 356 incriminating the water infestation crime. However, the aforementioned crimes might be considered ecological 'only by their damaging effect on the environment', being included in

the crimes category affecting other values but may have an ecological feature. That is why we think that the amendment of the the Criminal Code is highly necessary (Law no. 286/2009), materialized by the subdivisions designed t the crimes against the environment.

Chapter 6. The criminal legislation efficiency in the field of environment protection includes two sections: Section 1 – Environment law norms efficiency – where we analyzed the efficiency principle, its origin and dedication in jurisprudence CJUE and Section 2 – Conclusions and lex ferenda proposals.

The **lex ferenda** proposals and their formulation argument:

Comparing the Law no. 286/2009 relative to the Criminal Code and the Law no. 301/2004 Criminal Code and recognizing the merits of the latter, we underlined its lacking points, that is: even if the defense sectoral approach of environment protection was wanted, we observed that only the air, the water, the soil, the forest were protected, excluding the subsoil, the fauna, the flora, the aspects particular to the landscape, etc.; another sectoral approach was focused on the polluting activities, more precisely relative to: chemical fertilizers, pesticides and other toxic substances, waste (including nuclear and recyclable waste), nuclear fuel, ionized radiations, excluding: activities involving the genetically changed bodies obtained by modern biotechnology techniques, the activities involving the electromagnetic, the thermal radiation or vibrations; the regulation looked like a 'random' approach of crimes provided by the frame norm, the Emergency Government Order no. 195/2005 relative to the environment protection and was not performing a separation of the ecological crimes as compared to the other crimes (it does not underline the differences making it special). Starting from these statements and knowing that the New Criminal Code does not include environment crimes, I have formulated the following ***lex ferenda proposals f***or the future and necessary amendment of Law 286/2009:

- include a protection chapter by incriminating and sanction the facts leading to all environment elements: air, water, soil, forest, subsoil, fauna, flora, landscape's elements, etc.;
- include in the aforementioned chapter, the facts relating to all activities which might pollute the environment, that is linked to: chemical fertilizers, pesticides and toxic subdivisions, waste (including nuclear and recyclable waste), nuclear fuel, ionized radiations, excluding: activities involving the genetically changed bodies obtained by modern biotechnology techniques, the activities involving the electromagnetic, the thermal radiation or vibrations;
- include in the aforementioned chapter, the separation of ecological crimes as compared to the other, underlying the particularities;
- include in the aforementioned chapter, the ecological terrorism crime incriminated by other states' laws. Thus, the French criminal code from 1994, Article 421-2 states: An act of terrorism is considered an intentionally act connected to the individual or collective enterprise aiming to disturb severely the public order by intimation or terror, introduce a dangerous substance in the atmosphere, soil, subsoil, foods or feeding compounds or water, including the territorial sea, endangering the human being, the animals or the environment;
- include in the aforementioned chapter, an ecocide crime incriminated by other states' laws. Thus, the Criminal Code from the Republic of Moldova, Article 136 Ecocide provides: the mass destruction of flora and fauna, the atmosphere or aquatic resources intoxication, as well as crimes causing an ecological catastrophe punished from 12 to 20 years of imprisonment.

Thus, at the end of the environment crimes analysis chapter, we noted that an environment criminal law is difficultly shaped at all levels (national, community and international); neither the countries with full tradition may praise themselves with the drastically decrease of ecological delinquency acts, because the reality shows a small number of eco-law breakers are criminally condemned and the sanctions are also moderate – the explanation is simple and universally valid: the effective application of environment criminal right depends on the existence of: 1) specialized police officers; 2) criminal magistrates specialized on environment problems; 3) some legal institutions, especially the public ministry’s will to integrate the fight against the ecological delinquency amongst the priority objectives of environment policy. That is why, de lex ferenda, we formulated the proposal to create some

environment – specialized instances including specialized police officers, criminal magistrates specialized on environment crimes.

Then, noting the crimes within the Law 286/2009 relative to the Criminal Code, we may say that they can be considered ecological 'only by their harmful effect on the environment', being included among the crimes affecting other values and secondly being ecological. We know that the base treaties of the European Union, id est the European Union Treaty and the Treaty relative to the European Union operation establish in may articles the 'durable development of Europe and the Planet', they advertise the 'generations' solidarity' and ensure 'a high level of protection and improvement of the environment quality' as first degree objectives of the EU. This is the reason why article 11 of the Treaty for EU operation imposes that 'the environment protection requirements should be integrated in the definition and application of all EU policies and actions.' Subsequently, we concluded that our legislation has not integrated the environment requirements in the criminal policy even if Law 301/2004 Criminal Code may be seen as a good 'assay' to this effect. Therefore, ***de lex ferenda***, ***we formulate the proposal*** that the future Criminal Code should have the environment requirements.

Then, comparing the contraventions and the crimes within the Government Emergency Order no. 1952005, we underlined that the contraventional sanctions are not severe enough in order to establish a proper conduct of the people connected to the environment as compared to the compliance with the legal provisions relative to environment protection rules breaching. That is why, ***de lex ferenda, we formulate the proposal*** *to replace the legal framework of the act provided by article 96 item 3* of the Government Emergency Order 195/2005 relative to the environment protection providing: 3) Creates contraventions and sanctions by fee from Lei 7.500 (RON) up to Lei 15.000 (RON) for natural persons and from Lei 50.000 (RON) to Lei 100.000 (RON) for legal entities for the breaching of the following legal provisions: 15. the obligation of physical persons and legal entities not to cast in the surface and underground waters some petroleum or dangerous substances, water containing dangerous substances – *from contravention to crime* as it has a high degree of danger for contraventional sanction.

We also formulated the classical lex ferenda proposal for a new environment code enactment as we known that the enactment of a new code represents for any law field the expression of full maturity and final imposition to both legal system and juridical theory system. Moreover, we know that at least two main arguments pledge for its codification, id est the quantity and the quality: on one side, the explosive development of norms overpassing the tradition and needing order, argument and efficiency and on the other side, the systematized and globalized natural predisposition of the environment law.

Regarding the environment protection by criminal law means at the European Union level, ***we formulated a lex ferenda proposal*** to draft an EU conduct code in the field of cross-border ecological consequences which should consider the warranty rights of the human being's fundamental right to a healthy environment.

Finally, ***de lex ferenda we introduced the proposal to improve the sectoral law*** relative to the increase of the criminal liability ecological function in the priority fields, such as sylvan crimes and regarding the water protection. Currently, the incrimination criteria are of economic origin, inadequate for the facts representing true disasters on long term to both the environment and the human being existence.

Even in the case of the Sylvan Code, the economic character of the incrimination criteria was kept under the conditions leading to illicit land clearing and the created damages are immeasurable (loss of human lives, patrimonies, flora and fauna).