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The Challenges Related to Whistleblowing in the Field of Environmental Crime Prevention

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Abstract: Whistleblowing is an important activity not only for combating corruption, but also other irregularities and illegal actions. Protection of the environment is certainly a matter of public interest, and the prevention of crimes that violate its integrity is useful above all from the aspect of protecting peoples' lives and health.

In a large number of cases, environmental crime is very difficult to detect and prove. The role of the whistle-blower is of particular importance for the timely detection of environmental offenses and the reduction of occurrence or mitigation of harmful consequences. In this paper, we start from the assumption that whistle-blowers in the field of environmental protection are faced with a large number of challenges and are not adequately protected. They are mostly either fired by their employer or forced due to various pressures to quit without the possibility of new employment. Considering the importance of their role in the field of environmental protection, the possibility of improving their position should be reconsidered. In order to make recommendations for the improvement of both national regulations and practices related to the protection of whistle-blowers, in this work we primarily use the method of content analysis, as well as the dogmatic-legal method.

Keywords: whistle-blowers, environmental protection, environmental crime, crime prevention.

INTRODUCTION

Timely detection of environmental crimes is very important for preventing further consequences, securing and collecting evidence and sanctioning perpetrators. However, it seems that a large number of crimes that can be classified as environmental crime remain undetected. It has a harmful effect not only on the life and health of people, but also additionally encourages the commission of such acts (Bodrožić, 2014: 72). Bearing in mind the small number of reports, but above all convictions for criminal acts against the environment, it seems that cooperation between citizens, the civil sector and state authorities should be improved in this area. In some countries, such as the United States of America

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and the United Kingdom, the role of whistle-blowers in detecting environmental crimes is increasingly being affirmed (Protect, 2023).[2]

Bearing in mind the reports of international organizations, it can be concluded that environmental crimes are often connected with other types of criminality, so this can represent an additional deterrent factor for potential whistle-blowers (Radulović, 2023). Despite the above mentioned, they should be adequately motivated to report illegal actions in a timely manner in order to prevent the occurrence of greater and more serious consequences for peoples' lives and health. The role of the whistle-blower is particularly important when it comes to discovering the so-called "greenwashing", which refers to the false representation of products, services and business operations of companies as harmless to human life and health (de Freitas Netto et al., 2020: 6).

In this paper, we will first analyse the structure of environmental crime and the connection of those crimes with other crimes and criminal activities in order to point out the danger and increasing prevalence of environmental crime. Then, we will briefly analyse examples from practice to highlight whistle-blower protection problems that exist globally, and which discourage whistle-blowers from reporting environmental wrongdoings. The largest number of cases and the most well-known cases of whistleblowing in the above-mentioned area were recorded in the USA, so in this paper we refer to the examples from that country to the greatest extent. In this way, we will try to make recommendations for the improvement of legislation and practice. Therefore, in order to point out the problems that exist in practice with regard to the protection of whistle-blowers, we will analyse the provisions of the Directive on the protection of persons reporting violations of European Union Rights (Directive 2019/1937) as well as the practice of the European Court of Human Rights in the area of whistle-blower protection. Therefore, two methods dominate in this research – content analysis and dogmatic-legal method.

THE STRUCTURE OF ENVIRONMENTAL CRIME

Although environmental crime causes great damage to the environment and human health, it is often difficult to detect. The reason for this may be the fact that environmental crimes are most often considered the so-called victimless crimes, which may be one of the reasons for the lack of interest in reporting those crimes, and at the same time, the lack of reaction from the competent authorities (Wertheimer, 1977; Veneziano & Veneziano, 1993; Batrićević, 2013; Siebels, 2020). The largest number of criminal reports for acts that fall under environmental crime in the Republic of Serbia according to the data from the Annual Report on the work of the Republic Public Prosecutor's Office, refers to the criminal offense of forest theft (a total of 1.187 reported persons), followed by the criminal offense of killing and abusing animals (a total of 129 reported persons), illegal hunting (a total of 90 reported persons), forest devastation (a total of 68 reported persons) and other

2 In 2014, the non-governmental international organization Earth League International launched the WildLeaks network of environmental crime whistle-blowers. The mission of that project is to receive and evaluate anonymous information and give advice regarding environmental crime that concerns the environment and wild animals and take adequate protection measures. Crime reporting is done online and anonymously to encourage potential whistle-blowers from highly corrupt countries to report. More information about the project is available at: https://earthleagueinternational.org/about-us/.

crimes from the group of crimes against the environment (Republika Srbija, 2023: 52–55). According to the data from the report, a total of 67 persons were reported for the criminal offense of bringing dangerous substances into Serbia and illegal processing, disposal and possession of dangerous substances, only seven were charged, there were no convictions, and three acquittals were handed down (Republika Srbija, 2023: 53). It is similar with other criminal acts, 20 persons were reported for polluting the environment, of which three persons were charged, none were convicted, while three were acquitted. The same number of persons were reported for the criminal offense of environmental damage, for which one person was charged, while only one guilty verdict was passed. For the violation of the right to information about the state environment, only two persons were reported, while there were no accused persons (Republika Srbija, 2023: 52–55).

The largest number of reports for the criminal acts of forest theft, killing and abuse of animals, illegal hunting, bringing dangerous substances into Serbia and illegal processing, disposal and keeping of dangerous persons, environmental pollution, environmental damage, pollution of food and water for nutrition, i.e. power supply, were filed by the police (Republika Srbija, 2023: 52–55).

However, an extremely long period of time can pass from the moment a criminal offense is committed to the moment it is discovered, and then it is not possible to provide relevant evidence and prevent the occurrence of harmful consequences. This can affect the later outcome of the criminal proceedings, but it can also have very negative consequences for peoples' lives and health. That is why environmental protection should be encouraged. It is the persons who possess certain knowledge and experience of importance for its protection who could contribute to the timely prevention of consequences, the collection and provision of evidence of importance for criminal proceedings and the sanctioning of perpetrators of criminal acts.

Due to the cross-border nature of crimes that threaten the environment, their number has increased, as has the extent of harmful consequences for peoples' health and life. Based on the evaluation of the implementation of the Directive on the protection of the environment through criminal law, the European Commission determined that in the following period, at the level of the member states, it is necessary to collect statistical data related to environmental crime, which should be available to the public. The lack of information on the state of environmental crime can be conditioned by the lack of awareness of its scope, impact and the need to allocate the necessary resources. Therefore, in order to prevent environmental crimes, it is necessary to strengthen awareness both at the international and national level (European Commission, 2020: 79).

According to the data from SOCTA's 2021 report, the majority of reported cases of waste trafficking involve individuals working or managing waste management companies as managers or employees who violate national and international legislation governing the collection, treatment and disposal of waste in order to increase profits. Individuals who trade in waste in a manner contrary to the law generally have control over the entire processing cycle, from the country of origin to the country of destination. Criminals often use different legal business structures to commit crimes (European Commission, 2020: 4–5; EUROPOL, 2021: 13, 31, 54).

During the 2024, a new Directive of the protection of the environment was adopted (Directive 2024/1203) and replaced Directives 2008/99/EC and 2009/123/EC. The Directive

(EU) 2024/1203 emphasized the importance of whistle-blowers in reporting environmental crimes and preventing harmful effects on the environment (Item 54 of the Preamble). According to Article 14 of the above-mentioned Directive each member state has the obligation to take adequate protection measures for any person who reports an environmental crime, provides evidence or otherwise cooperates with the competent authorities in accordance with Directive (EU) 2019/1937 and national legislation.

Environmental crime, apart from being harmful to peoples' lives and health, is also connected to other types of crime. During 2015, INTERPOL conducted an analysis of operational activities related to environmental crime. It is recorded that the mentioned type of crime is often connected with other criminal acts, such as money laundering, tax evasion, corruption, piracy, forgery, corrupt crimes, drug and firearms trafficking. Such a situation is confirmed by questionnaires filled in by 33 member countries (INTERPOL, 2015: 3). Of course, certain specificities were observed in each country. In Canada, counterfeiting of goods has been linked to trade in substances that deplete the ozone layer. According to the data from the analysis, in Hungary corruption and forgery were linked to trade in substances that deplete the ozone layer. In Germany, counterfeiting was linked to the illegal pesticide trade, in Hungary corruption and forgery were linked to waste trade, in Sweden fake stickers indicating the level of chlorofluorocarbons on refrigerators were linked to pollution, while in Switzerland financial crime was linked to illegal transport and treatment of hazardous waste (INTERPOL, 2015: 4). Environmental offenses are often viewed separately from other serious crimes. However, bearing in mind the examples mentioned, it should still be considered inseparable from other criminal offenses (e.g. corruption). Officials use their position to issue permits for illegal logging, so this can be a hindering factor in discovering and gathering evidence against perpetrators of acts that can be considered environmental crimes (INTERPOL, 2015: 8). Therefore, according to the position of INTERPOL, a multidisciplinary approach is necessary with the simultaneous cooperation of various institutions both at the national and international level (INTERPOL, 2015: 11).

Bearing in mind the above, it can be concluded that each country faces specific challenges in the field of environmental crime. Precisely in such circumstances, timely reporting of irregularities would be significant, and then the role of the whistle-blower would be of particular importance. However, it seems that whistleblowing has its price and it is often quite high for the whistle-blowers themselves, although in some situations it really changes the illegal practice and contributes to the improvement of both the practice and the legislation in the field of environmental protection.

WHISTLEBLOWING CHALLENGES – EXAMPLES FROM PRACTICE

The ability to access information from the field of environmental protection and public participation is one of the basic principles of environmental law (Drenovak Ivanović, 2019: 122). Protection of the environment, and therefore of peoples' health, is certainly a public interest (Drenovak Ivanović, 2019: 130; Đurić & Vranješ, 2020: 49–50).

Environmental whistleblowing often comes at a high cost to whistle-blowers. They are left without a job or the possibility of further employment due to reporting irregularities, which is sometimes also in their job description. It really works as a disincentive for po-

tential whistle-blowers. Whistle-blowers often have an internal conflict that contains a moral and practical component (Višekruna, 2016: 370). The moral component means loyalty to the employer and the collective, and the practical fear for job security (Višekruna, 2016). Since in the field of environmental protection, potential whistle-blowers are mostly persons employed in the private sector, it is certain that only a small number of employees will decide to report irregularities. This may be related to their economic vulnerability and fear of retaliation due to the cancellation of the employment contract (Martić, 2016: 210). Whistle-blowers in the field of environmental protection have always suffered such consequences, even though the obligation to prevent irregularities was in their job description.

A nuclear accident occurred in Pennsylvania, USA, in late 1970s. A whistle-blower, Richard D. Parks, revealed to the public the facts about how corporate corruption contributed to the disaster. He was hired as a cleanup supervisor by the corporation, and his work was overseen by the Nuclear Regulatory Commission. That cleanup was not only risky and laborious, but also delayed. Parks spoke openly about the unsafe cleanup process, which could have contributed to an even bigger environmental disaster. He believed, and soon reported, that all the necessary certificates had not been obtained in accordance with the rules under which the National Radiation Center licensed the facility. Because of this, the contract on the basis of which he was hired was cancelled. However, his actions contributed to the persons responsible being accused of falsifying data (Unger, 1986; The focus, 2022).[3]

In the United States of America during 2000 a case of whistleblowing was recorded by Fardin Oliaei who worked as a senior researcher and coordinator of the new pollutant program at the Agency for the control of pollution in Minnesota (MPCA) and a member of the Board of the Women's Institute for the Environment (WEI). She researched the dangers of pollutants entering the environment and thus directly endangering both the environment and human health. She was the first scientist to raise environmental and health concerns over the risks posed by perfluorinated chemicals from a family of synthetic compounds used in waterproofing cookware, firefighting foam and food packaging produced by the multinational corporation 3M from Minesota. In her research, she found that the contamination had spread throughout the state and that the chemicals were present in the fish in the national park and even in the drinking water (Becker, 2015: 81–82; Groen, 2023; Edgerly, 2018). Dr. Oliaei's work was halted by the Agency for the pollution control executives, and her further requests to conduct research were also denied. She was forced to leave her job at the Agency for the control of pollution and the Board of the Women's institute for environmental protection, of which she was a co-founder, due to the disclosure of the research results to the public, which made it impossible to carry out further research in the same area. As she failed to find a job in the profession in Minnesota due to various pressures on potential employers by the international corporation 3M, she was forced to leave the state. Minnesota was later able to settle with the said corporation regarding the payment of damages due to the pollution of the environment and the impact on human life and health. Despite this, Fardin Oliaei's position that the amount of compensation is not enough to correct and rehabilitate the problems that have arisen in the last 50 years is justified (Groen, 2023; Edgerly, 2018). In this way, she wanted to point out the need for a timely and adequate reaction of the state and competent institutions.

3 The whistleblowing was linked to the worst nuclear accident in the US history in 1979, when one of two nuclear reactors operated by General Public Utilities at Three Mile Island in Pennsylvania suffered a partial meltdown.

One of the more recent examples of whistleblowing in the field of environmental protection dates back to 2020. This was the case of Desiree Fixler, who worked for eight months as the head of the sustainability department at the investment company DWS, a subsidiary of Deutche Bank. She went public with the claims that her former employer DWS was "greenwashing" or exaggerating its sustainability credentials in its annual report. Although she was subsequently fired by her employer at the time, her activity contributed to an internal investigation by the German and US regulators and contributed to the implementation of significant reforms (Batchelor, 2023; McGachey, 2023; Bartz, 2023).

Unlike Desiree Fixler, for whom informing the authorities in the company was in some way in the job description, bearing in mind that she was employed in the position of sustainability manager, the authors rightly believe that it is difficult for environmental whistle-blowers who are employed in different sectors to be familiar with all laws that provide protection to whistle-blowers and that prescribe the manner of reporting (Becker, 2015: 80).

EUROPEAN STANDARDS ON WHISTLEBLOWING

During 2019, the Directive on the protection of persons who report breaches of the EU law (Directive 2019/1937) was adopted at the level of the European Union. Its provisions cover both public and private sector employees who report irregularities they learned about in the work environment. Its provisions are also applied to the so-called self-employed persons who are under the supervision of subcontractors and suppliers, i.e. persons who report or publicly disclose irregularities that they learned about during the performance of work that they have stopped performing in the meantime, as well as persons who report illegalities and irregularities, and whose performance of work has yet to be completed or begin (refers to information that they learned about during the employment process or during negotiations that precede the conclusion of the contract (Article 4). Its provisions apply to all persons, regardless of the area in which the whistleblowing is carried out. However, they can have a deterrent effect on potential whistle-blowers from the field of environmental protection because they are primarily based on the protection system, while the reward system, which could be a very important motivating factor in reporting irregularities is neglected. However, it should be borne in mind that the standards prescribed by the Directive are minimal, so member states should implement them as such in their national legislation. At the same time, this also means that member states could prescribe a higher level of protection, including rewards for whistle-blowers who report irregularities, with possible compliance with the provisions of some other regulations (Terracol, 2023: 10).

According to the provisions of the Directive, protection is provided to the persons who report irregularities, if they had a justified reason to believe that the reported information was true at the time of their reporting, if the report was submitted in accordance with the provisions that prescribe the method of internal, external and public whistleblowing. In the field of environmental protection, it is particularly important to inform the public (e.g. the media) about illegalities and irregularities, but under certain conditions. Namely, it is necessary for the person to first submit the application through internal or external channels or exclusively through external channels if appropriate measures were not taken at the

previous levels of notification. Public whistleblowing is also possible in situations where the applicant has a justified reason to believe that the injury may represent an immediate danger to the public interest, when there is a risk of retaliation or there is a low prospect of the breach being effectively addressed, due to the particular circumstances of the case, such as those where evidence may be concealed or destroyed or where an authority may be in collusion with the perpetrator of the breach or involved in the breach (Article 15 of the Directive). It is the possibility of destroying evidence, but also the immediate danger to the public interest in terms of the possibility of endangering the lives and health of a large number of people, that is the basis for direct information to the public by whistle-blowers from the field of environmental protection.

European standards prescribe an exception to the prohibition of possession, use and communication of a trade secret if a person uses it to express freedom of expression and prevent illegal or improper actions and activities in the public interest – Article 5 of the Directive (2016/943) of the European Parliament and of the Council on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure. Disclosure of the data on irregularities in the field of environmental protection belongs to information that is disclosed for the purpose of protecting the public interest, so in those situations there would be no obligation to keep business secrets.

Whistle-blowers should be afforded effective protection not only through national legislation, but also by connecting them with the lawyers who are qualified to provide them with protection from retaliation and provide them with rewards for reporting wrongdoing. Non-governmental organizations would have a very significant role in connecting whistle-blowers with representatives and providing adequate legal protection. In addition, they would have a significant role in monitoring the effects of whistle-blower protection and informing the public about those cases.

As one of the problems related to the application of the law on the protection of whistle-blowers, the authors state that they are applied only after the disclosure of information, i.e. when the retaliation against the persons who discover it has already begun. A large number of persons disclose information in good faith, without thinking about their role as a whistle-blower. In addition, they often fail to gather sufficient evidence of retaliation for reporting wrongdoing (Martin, 2003: 4).

Additionally, the problem with protecting whistle-blowers is that they are usually up against a powerful organization that can pay more to get adequate legal advice and have little to lose if the case drags on. At the moment when they seek judicial protection, whistle-blowers are often without income, so they are not even able to pay for adequate legal protection (Martin, 2003: 5). This is precisely why it would be necessary to provide for the awarding of whistle-blowers in national legislation and in practice.

When it comes to the protection of whistle-blowers, the practice of national courts is also greatly influenced by the practice of the European Court of Human Rights. In the field of environmental protection, whistle-blowers are mostly persons who are employed or hired in the private sector, so some of the decisions of the aforementioned court could have a demotivating effect on potential whistle-blowers. This is, for example, the case with the judgment in Hallet v. Luxembourg (Application number 21884/18) from 2021, in which different criteria are taken into account when assessing the merits of whistle-blower pro-

tection in the private sector compared to the protection of whistle-blowers in the public sector. In the aforementioned judgment, the European Court of Human Rights referred to the possibility of limiting freedom of expression, justifying the position taken by the first-instance court in Luxembourg in its decision, because informing the public in the specific case had to be limited in order to protect the shareholders, employees and the wider economic community. In addition, the European Court of Human rights considered that the employee's right to freedom of expression about the employer's illegal or improper behaviour must be weighed against the employee's obligation to take care of the employer's commercial interests and reputation (Dussuyer et al., 2015: 37). Therefore, according to the position of the European Court of Human Rights, the ratio of damage that may occur to the public interest should be balanced against the employer's private interest. In this particular case, it was about an economically very influential employer. Although the petitioner's public whistleblowing was related to the tax area and not to the environmental protection, we can assume that in most cases concerning environmental whistleblowing, it will be about economically influential employers, which could pose a problem with aspects of whistle-blower protection. According to the European standards, it is important that the whistleblowing was done in good faith, which would mean that at the time of communicating the information, the other reason, such as e.g. the desire to take revenge on the employer did not exist. When it comes to the area of environmental protection, there is no doubt that there is a public interest in informing the public about its endangerment, so there should be no weighing of the damage to the public interest and the commercial interest of the employer where the whistle-blower was employed (Kostić, 2022: 207–208).

CONCLUSION

Based on the results of our research, it can be concluded that it is necessary to improve the protection of whistle-blowers at the national level. Even in the United States, which has long had a mechanism to protect whistle-blowers, there are cases where the system has sided with financially powerful corporations instead of whistle-blowers. The judgment of the European Court of Human Rights in the case of Halet v. Luxembourg, which in our opinion deviates from the European standards that are applied in the same way in both the public and private sectors, could be in favour of such a practice and at the level of the European Union. Although perhaps based on the judgment of the said court, the conclusion would be that it is necessary to review the standards in the area of whistle-blower protection, we believe that this would cause more harm than good. This would have a particular impact on the field of environmental protection, which requires a timely response by whistle-blowers in order to ensure and collect the prevention of harmful consequences for peoples' lives and health. In addition, the prevention of environmental crime certainly represents a public interest, which should always be given priority over the reputation and interests of employers from the private sector.

In 2014, the Whistle-blowers Protection Act (Zakon o zaštiti uzbunjivača, 2014) was adopted in the Republic of Serbia. However, the protection of whistle-blowers, as well as the awareness of the importance of their role, seems to be at a very low level.

Although the provisions of the Whistle-blowers Protection Act are largely harmonized with international standards, the position of whistle-blowers should be improved both through legal provisions and at the level of practice. We believe that it would be useful if the Law prescribed a monetary sanction for persons who hinder the whistle-blower or prevent him from submitting a report at the internal level, as well as against persons who take retaliatory measures both against the whistle-blower and against persons close to him. In addition, the Law does not prescribe the possibility of rewarding whistle-blowers, which would certainly be an incentive. However, it seems that in connection with its establishment, certain objections could be raised about the possibility of abuse of the right to report. In order to prevent such situations, a sanction could also be introduced for persons who abuse the said right if, in accordance with the provisions of the Whistle-blowers Protection Act, the existence of such a circumstance is established.

The establishment of a monetary reward would not act as an incentive for potential whistle-blowers, but would also represent significant financial support in case of dismissal by the employer, until finding a new job or returning to the old one after the end of the court proceedings.

The Whistle-blower Protection Act does not prescribe which bodies potential whistle-blowers should contact in case of external whistleblowing. When it comes to the area of corruption, perhaps it is quite clear that that body should be the Agency for the Prevention of the Corruption. However, it is unclear who potential whistle-blowers could turn to when it comes to reporting irregularities in the field of environmental protection (although in such situations there would generally be justified circumstances for raising the public whistleblowing).

It would be useful to establish a special network of non-governmental organizations at the national level regarding the protection of whistle-blowers, which would significantly help them with legal protection during possible court proceedings, but also with other experts (e.g. psychologists or psychotherapists), bearing in mind the possible stress due to the application of retaliatory measures both against the whistle-blowers and to the persons close to them.

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