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Scientific criticism of “Unlawful prosecution regarding forest ecosystem destruction”


Crítica científica de “Unlawful prosecution regarding forest ecosystem destruction”


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ABSTRACT: This scientific criticism was based on what was proposed in the article “Unlawful prosecution regarding forest ecosystem destruction,” aiming to expand its discussion, especially from a comparison between the Polish and the Brazilian reality. For this purpose, exploratory, documentary, and bibliographic research was carried out, allowing the recognition that the similarities in the prosecution of environmental crimes bring both countries closer together than they are further apart despite clear distinctions of environmental reality and criminal procedural diversity, especially concerning evidence.

KEYWORDS: Scientific criticism; environmental crimes; forensics; criminal procedure.

RESUMO: Esta crítica científica partiu do que foi proposto pelo artigo “Unlawful prosecution regarding forest ecosystem destruction”, com o objetivo de ampliar a discussão trazida pelo artigo, em especial, a partir de uma comparação entre a realidade polonesa e brasileira. Para tanto, realizou-se pesquisa exploratória, documental e bibliográfica, de onde foi possível reconhecer que, apesar das claras

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distinções da realidade ambiental, bem como, da diversidade processual penal, em especial no que se refere à prova, a maior conquista do artigo foi demonstrar que, na persecução dos crimes ambientais, as semelhanças aproximam mais do que se distanciam os dois países.

PALAVRAS-CHAVE: crítica científica; crime ambiental; perícia criminal; processo penal.

INTRODUCTION

The analyzed text deals with the current material and procedural legislation regarding environmental crimes in Poland and, by extension, in Europe. It typifies the conduct considered environmental crimes and introduces a problem: the use of subjective terms, such as “substantial damages”. “Thus, criminal investigators, prosecutors and criminal judges have broad discretionary powers considering this key element of environmental crimes”. Generally:

This results in the situation where part of the Member states considers the financial value of the resulting environmental damage based on the financial benefits for the offenders, environmental remediation costs and the value of the damaged assets. Others focus on the ecological impact of the environmental damage, considering its duration and irreversibility. Nonetheless, these differences are acceptable despite inevitable diversity in the interpretation of criminal damage.

The text informs that the member states of the European Union were obliged to introduce more severe sanctions against these crimes, but it did not bring practical results. Furthermore, interestingly, judges do not use all available sentences where sanctions have been aggravated, for instance, arrests are made but suspended or not carried out in full.

After this reasoning about environmental crimes, the text presents a related case typified by Article 187 of the Polish Penal Code, i.e., the destruction or essential reduction of natural areas and objects. In this case, the defendant was accused of having destroyed an area of vegetation

covering approximately 9 hectares and was eventually acquitted. However, the article considers that “if the investigators had adequate knowledge of the methodology of the environmental crime investigations and reflected on foreseeable defence, the result might have been favourable to the prosecution.” Thus, the analyzed text sought to bring up possible solutions to increase the efficiency of the police response in these cases.

In turn, our criticism aimed to show distinctions and similarities between the criminal prosecution of environmental crimes in Poland and Brazil but specifically regarding the production and use of technical evidence. It was performed through exploratory research, developed from documentary research of legislation and bibliographic research of books and articles, expanding the academic dialogue, especially among those interested in comparative law.

1. TECHNICAL EVIDENCE IN ENVIRONMENTAL CRIMES IN POLAND AND BRAZIL: MORE SIMILARITIES THAN DIFFERENCES

The work “Unlawful prosecution regarding forest ecosystem destruction” addresses the reality of Poland but, unfortunately, has had repercussions in Brazil, due to limited environmental crime investigations and respective effects on criminal prosecution. Many of these issues are directly related to the production of technical evidence because, in crime against the environment, suitable and extensive expertise is essential to establish all pivotal elements². In such cases, the role of environmental forensic agencies has proved to be fundamental for the materialization of criminal intent against the environment, with courts prioritizing expert opinions³. As the text points “In practice, criminal investigative authorities rely heavily on expert opinions in determining the size of environmental damage.”.

² GARRIDO, R.G.; ARARIPE, I. Y. D. S. ; MENDES, M. C. Desencontros nas Perícias Ambientais. *Revista Magister de Direito ambiental e Urbanístico*. 100, p. 110-127, 2022

³ SOLODOV, D.; ZEBEK, E. Environmental forensic inquiries in investigating environmental crimes in Poland and Russia, *Environmental Forensics*, v. 22, p. 315-324, 2020.

However, it is worth noting that there are significant procedural differences in the production of technical evidence in that country. Unlike our obligation to carry out a forensic examination in all infractions that leave a trace (art. 158, CPP), crime scene investigations are not considered mandatory in all cases by Polish law, leaving it to the discretion of the authorities, who appoint experts for the specific case. Also, regarding technical assistants, our law (art. 159, § 3 and 4) does not limit the recognition of the work produced by the expert indicated by the parties as evidence provided that his or her performance has been admitted by the judge. In Poland, “the opinions of partisan experts are treated as the information about evidence (potential evidence), not as self-sufficient pieces of evidence.” In the same sense, we take the position that “there are no a priori reasons to disregard the characteristic of technical evidence from the technical opinion at the same epistemic level of the expert report.”⁴.

The article also surprised us when it finds that, in contradiction to the Brazilian procedural rule (art. 159, § 6), it makes available to the Technical Assistants the evidentiary material that served as the basis for the expertise. In order to guarantee the chain of custody, in Poland “Private forensic experts are also facing some considerable methodological challenges. Even if the defense hires such an expert, he or she won’t have direct and full excess to the case materials, including crime scene documentation and material evidence.” It seems to us to be an evident affront to the constitutional principles of contradictory and full defense⁵.

With regard to the technique, often, as approached by the author of the work analyzed, exams are limited by the unavailability of equipment, expert knowledge or simply dynamics in nature. Fast environment transformation time, even if it is not enough to completely return to its original conditions, ends up making transitory traces or modifying them to the point of hindering the determination of the previous state. As a result, the search for evidence becomes more difficult and applying the five principles of criminalistics (transfer, identification, individualization,

⁴ LEITE, H. M.; LEITE, J. S. de S.; GARRIDO, R. G.. O valor probatório da assistência técnica. Revista da Faculdade de Direito da UFRGS, n. 38, 2018, p. 277.

⁵ *Ibidem*.

association between source and destination, and reconstruction) is insufficient, and even considering division⁶, that is, the perception that matter is transformed by the criminal event itself, before being transferred, hinders a conclusion.

Furthermore, the lack of a unified methodology for environmental forensic examinations is a reality in Poland and Brazil. It is therefore important to go beyond expert inherent limitations, there is also a lack of structure of forensic agencies and analytical methods and parameters, besides time-lag between the fact and its examination, as proposed in the text. It should be added the non-definition of clear objectives for exams and the lack of requirements established by the requesting authority⁷.

Added to this is the difficulty both in valuing environmental damage economically and defining vague expressions such as “substantial damage”, as questioned in the text. Economic environmental damage valuation has been widely discussed, but it will hardly reach a common denominator. This is because such valuation is related to the potential uses, social perceptions of the preserved environment, or even due to the natural resources that are extracted therefrom⁸.

Another major point addressed by the text on environmental crime investigation is the poorly coordinated relationship between criminal prosecution and environmental defence institutions. Again, an issue that has been an obstacle also in Brazil. Disorganization and non-cooperation, besides delaying the investigation, can more harmfully generate ambiguous reports that make the clarification of facts difficult⁹.

In practice, the expert is often confronted during on-site examinations of the probable environmental damage with documents presented by the owner that show sparse permissions from environmental agencies and the position of the competent entity. This ends up being

⁶ INMAN, K e RUDIN, N. The origin of evidence. *Forensic Science International*. 126, 1, p. 11-16, 2002.

⁷ GARRIDO, R.G.; ARARIPE, I. Y. D. S. ; MENDES, M. C. Desencontros nas Perícias Ambientais. *Revista Magister de Direito ambiental e Urnanístico*. 100, p. 110-127, 2022

⁸ *Ibidem*.

⁹ *Ibidem*.

reflected in other moments of criminal prosecution and, somehow, it also happened in the presented case, as shown in the excerpt: “The fact that the defendant was permitted by the local authorities to cut down several dozen trees in the same forest meant that those trees had no natural value – the fact that, in the court opinion, threw additional doubts on the expert’s findings.”.

However, despite the delay in reporting environmental crimes to authorities compared to crimes against life as reported by the author studied, this time lag has decreased dramatically. For some time, people have been more concerned with the environment. In the USA, for example, the perception of environmental crimes to be more serious than other crimes, such as drug use, crimes against property, and income tax evasion, has already been reported¹⁰. Thus, civil society and individual citizens are more attentive to aggressions and willing to denounce them, increasing the number of reports to government programs such as “Linha Verde” through a hotline (Disque-denúncia, in Portuguese) in the State of Rio de Janeiro¹¹.

Even with environmental agencies still uncoordinated with the police, they have modernized and performed more effectively. Moreover, criminal prosecution institutions themselves have specialized and created bodies especially focused on such action. There are also proposals such as that of White¹², which it is suggested the establishment of specialized environmental courts, as another institutional mechanism to effectively respond to these crimes, such as the Land and Environment Court in New South Wales, Australia.

¹⁰ SHELLEY, T. O’C.; CHIRICOS, T.; GERTZ, M. What about the environment? Assessing the perceived seriousness of environmental crime, *International Journal of Comparative and Applied Criminal Justice*, 35:4, p. 307-325, 2011.

¹¹ LINHA VERDE. O Disque Denúncia do Meio Ambiente. Disponível em: <https://www.disquedenuncia.org.br/programas/Linha-Verde>. Acesso em 22 mai 2022.

¹² WHITE, R. Environmental Crime, Ecological Expertise and Specialist Environment Courts. In: Gacek, J., Jochelson, R. (eds) *Green Criminology and the Law*. Palgrave Studies in Green Criminology. Palgrave Macmillan, Cham. 2022.

FINAL CONSIDERATIONS

Thus, reading the article “Unlawful prosecution regarding forest ecosystem destruction” allowed noticing differences between Brazil and Poland regarding ecosystems and a pro-environmental attitude and nature value perceptions by their populations¹³, in addition to procedural institutes related to expertise quite restrictive in the European country. However, the environmental criminal prosecution issues are quite similar. In general, the text proves to be interesting for scholars in the pursuit of national and foreign environmental crimes, mainly because it allows for the understanding of similarities.

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¹³ LATAWIEC, A. E.; PENNA-FIRME, R.; PENA, I.A.B. et al. Perception-Based Study on the Value of Nature to People and Land Sparing for Nature in Brazil and Poland. *Sustainability*, v. 12, 8860, 2020.

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