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The Criminalization of Environmental Harm: Theoretical Perspectives in the European Union

Krisztina Ficsor*

Department of Legal Theory and Sociology of Law, Faculty of Law, University of Debrecen, Hungary

(*) correspondent author, email: ficsor.krisztina@law.unideb.hu

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Abstract

Climate change poses a serious threat to the health and well-being of people and the environment and is one of the most pressing issues facing the European Union today. The damage caused by rising global temperatures, extreme weather events, and the resulting environmental degradation are not only ecological concerns but also directly impact human life. The greatest challenge for states worldwide is to find out how to combat climate change and its consequences with legislation. This situation demands a reevaluation of legal liability in the context of environmental harm. Traditional legal approaches often focus on punishing individual transgressions and direct harm, but climate change and environmental damage are collective and long-term problems that require a more systemic approach. The complexity of the problem comes from the fact that climate change and its serious consequences are the result of human action. However, most of these actions are legal. The special features of environmental harm and damage must encourage governments to reconsider the concept of legal liability and other general issues concerning the function of law. With normative legal methodology, this essay elaborates on these issues from the perspective of European Criminal Law and the criminalization of environmental harm.

Keywords: *Environmental Criminal Law, Ecojustice, Environmental Harm, European Union*

INTRODUCTION

According to the classic idea, criminal law's function is to prevent the most dangerous and the most grievous conducts that cause serious harm to individuals and society. It has been recognized that environmental pollution affects not only human beings' health and life but whole ecosystems, which can be altered or disappear. It seems that if the prevention of environmental damage is a priority

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worldwide, criminal law cannot escape from dealing with the problem of climate change and the pollution of the environment.

The European Union (EU) determines large-scale efforts and goals through legislative acts to protect the environment and prevent behaviors that cause severe damage to it. As a report by the European Union Agency for Criminal Justice Cooperation in 2021 shows, environmental crime is the fourth largest criminal activity in the world[1], and governments must respond rigorously to it.

To achieve these goals, the EU ensures that perpetrators of environmental violations do not escape prosecution and punishment. That is why the EU obliges Member States to criminalize the most serious environmental law violations. As can be seen, criminal law and criminalization are essential means for the EU[2] to fight against climate change and environmental pollution.

Notwithstanding, it is still controversial whether criminal law can be an effective "weapon" against climate change and its consequences. This essay's primary purpose is to reconstruct the theoretical problem of applying criminal law to prevent conduct causing serious environmental harm. It is also an important goal of this essay to highlight how criminal law is used in Europe to protect the environment.

This study highlights the primary purposes of the EU's criminal policy concerning climate change and its consequences. By analyzing the significant legal sources of environmental criminal law adopted by the EU's institutions, the author tries to shed light on the general issues and problems of environmental criminal law. The fact that Hungary is one of the member states of the EU and the author is of Hungarian nationality provides the opportunity to demonstrate the Hungarian experiences in implementing the European environmental and criminal policy and legal norms in the Hungarian legal system. Thus, the essay will briefly summarize the reality of the

[1] Eurojust., *Report on Eurojust's Casework on Environmental Crime* (The Netherlands: Report on Eurojust's Casework on Environmental Crime, 2021), https://data.europa.eu/doi/10.2812/780655.

[2] Sara Paiusco, *Nullum Crimen Sine Lege, the European Convention on Human Rights and the Foreseeability of the Law*, 1st ed., vol. 55, Schriften Zum Internationalen Und Europäischen Strafrecht (Baden: Nomos Verlagsgesellschaft mbH & Co. KG, 2021), 21, https://doi.org/10.5771/9783748922766.; Karsai Krisztina, "Európai Büntetőjog" in Jakab András – Könczöl Miklós – Menyhárd Attila Sulyok Gábor (Szerk.): Internetes Jogtudományi Enciklopédia," ed. Zsolt Szomora, 2023, 1–17.

Hungarian criminalization of environmental harm. In the end, the analysis will focus on the general theoretical problems and solutions for the issues of criminalization in the field of environmental law.

METHODOLOGY

This research applies normative legal research methodology. Applying the normative legal research methodology to analyze climate change and environmental harm within the framework of European Criminal Law involves examining existing laws, legal principles, and regulatory frameworks to determine their adequacy and potential for adaptation to address environmental issues. Normative legal research is fundamentally concerned with the "ought" questions in law—what the law should be rather than what it currently is.[3] In this case, the analysis will explore how European Criminal Law might evolve to more effectively combat climate change by criminalizing specific harmful actions that are currently legal but environmentally damaging. This research uses a conceptual legal approach and a statutory approach. The conceptual approach is used to provide a particular concept of criminalization of environmental harm. The statutory approach analyzes the environmental and criminal policy in the European Union and Hungary. These two legal approaches support this research with primary and secondary legal materials.

RESULT AND DISCUSSION

The main principles of European criminal law

Montesquieu's idea of criminal law in his book *the Spirit of Laws* provides a basic notion of state power.[4] The French political philosopher from the Age of Enlightenment contributed to the development of thinking about the grounds of

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[3] Joshua B Fischman, "Reuniting 'Is' and 'Ought' in Empirical Legal Scholarship," *University of Pennsylvania Law Review* 117, no. Northwestern Public Law Research Paper No. 14-15 (December 16, 2013), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1002&context=penn_law_review.

[4] Alexander Trubowitz, "Montesquieu's Gentle Prince: The Law of Majesty and the Moderation of Despotism in the Spirit of the Laws," *History of European Ideas* 44, no. 2 (February 17, 2018): 194–209, https://doi.org/10.1080/01916599.2017.1393764.

state power in modern European states. His theory of the separation of powers is still an important topic in political and philosophical discussions and one of the most significant principles in modern constitutions. He established a theory of the state which has limited power over its citizens and a state that provides liberty for the members of the political community.[5] In *the Spirit of Laws,* Montesquieu stated that "Political liberty consists in security; or at least, in the opinion that we enjoy security. This security is never more dangerously attacked than in public or private accusations. It is, therefore, on the goodness of criminal laws that the subject's liberty principally depends."[6]

According to my interpretation of these notions, criminal law reflects the moral relationship between the state and the individual. It establishes the legitimate grounds or limits of taking or constraining individual liberty by the state. Because criminal law determines the harshest consequences (sanctions) to illegal conduct, it is inevitable for the state to provide legitimate reasons for criminalization. This study agrees that the "goodness" of criminal laws depends on how convincing the justificatory background behind the state's authority is when using its power to control individual freedom.

The justification for using criminal punishments for some conduct is often apparent. Citizens do not call into question the legitimacy of imposing state punishments (e.g. imprisonment) on someone if she commits e. g. manslaughter.[7] There are serious harms to others, the criminalization of which is, so to speak, "natural." However, there are the so-called "hard cases" of causing harm[8] to others, the criminalization of which cannot be taken for granted, where the legitimacy of using criminal law becomes controversial, e.g., whether immoral conduct can be criminalized; can immorality be interpreted as causing harm to others; or is it justified to impose

[5] Felix Petersen, "Montesquieu and the Concept of the Non-Arbitrary State," *The European Legacy* 28, no. 1 (January 2, 2023): 25–43, https://doi.org/10.1080/10848770.2022.2106638.

[6] Charles Louis de Secondat and Baron de Montesquieu, *Complete Works: The Spirit of Laws*, vol. 1 (London: Liberty Fund, Inc., 1777), 269, http://oll.libertyfund.org/title/837.

[7] Katalin Gönczöl, "Developing Humane Criminal Justice Systems in Democratic Societies: An Update from Hungary," *Probation Journal* 52, no. 2 (June 2005): 181–86, https://doi.org/10.1177/0264550505052687.

[8] Stephen Pink and Joel Feinberg, "Social Philosophy.," *The Philosophical Review* 84, no. 2 (April 1975): 36–54, https://doi.org/10.2307/2183986.

criminal sanctions on others when they cause harm only to themselves and not to others?

These "hard cases" continuously force legal philosophers to reconsider criminal law's legitimate function and nature. This is the case with the problem of environmental pollution and its consequences as well. It is evident that environmental pollution directly causes severe damage and harm to people. However, it is a controversial issue of when and how criminal law can be a legitimate "tool" to prevent actions that fall under the category of environmental pollution.[9]

Before we turn to this theoretical problem, this study briefly lays out the essential principles that play a significant role in the justification of criminal law and the authority of states in European countries. In this study, the "goodness" of criminal laws is determined by substantive and formal demands that criminal law must meet.

a. Substantive Demands

The so-called substantive demands are connected to the substantive and normative interpretation of liberty and the limits of criminalization. They focus on the issue that political authorities must respect the human rights of individuals when adopting, interpreting, and applying criminal norms; that is, criminal law's "starting point" must always be human dignity, autonomy, and freedom of action.[10] Substantive demands reflect the political morality behind criminal law, the normative constraints on state power.[11]

Concerning this, one of the most important principles of criminal law is the principle of the ultima ratio or the subsidiarity of criminal law. According to this principle, criminal law must be a last resort in regulating social problems. Criminal law can only be used when there is no "softer" solution to the social problem than criminal

[9] Gordana Mršić, "Environmental Protection from the Aspect of Criminal Law," *Intereulaweast: Journal for the International and European Law, Economics and Market Integrations* 8, no. 1 (2021): 129–51, https://doi.org/10.22598/iele.2021.8.1.7.

[10] Balázs József Gellér, *Legality on Trial: A Theoretical Analysis of the Legality of Substantive Criminal Norms*, Elte Jogi Kari Tudomány 17 (Budapest: Eövtvös University Press, 2012), 44–45.

[11] Jeremy Horder, *Ashworth's Principles of Criminal Law* (Oxford: Oxford University Press, 2022), 65–82, https://doi.org/10.1093/he/9780192897381.001.0001.

legislation. In this context, we ask the "why" question: why should the state criminalize certain kinds of actions?

As can be seen, the substantive principles of (European) criminal law primarily focus on the rights of human beings and respecting their freedom and autonomy.[12] Later in the analysis, it will also be evident that the EU endeavors to change its focus on the consequences of climate change and incorporate environmental harm in the doctrinal framework of criminal law. However, the focus of criminal legislation is still oriented toward human beings' rights and well-being. The "rights" and interests of the environment itself get little attention in the framework of environmental criminal legislation.

b. Formal Demands

Formal requirements focus mainly on the ways of creating and interpreting criminal statutes, that is, the demands of legality and legal certainty.[13] According to these principles, criminal norms must enable citizens to regulate their conduct without doubt concerning their meaning: only the authorized legislator can determine crimes, and criminal norms must be clearly and precisely defined so that citizens can grasp and understand what kind of conducts are required and forbidden by criminal law. Criminal law must enable citizens to predict and calculate their future lives, making their lives predictable. Concerning these issues, we ask the "how" question: how can criminal statutes and norms be defined to be clear and understandable for the citizens and judges?

In this context, the *nullum crimen/nulla poena sine lege* principles must be mentioned, which usually include more sub-principles: the principle of non-retroactivity and maximum certainty, the requirement of written and general criminal norms and the prohibition of analogy in the application of criminal statutes.[14] The criminalization of environmental harm must also consider these formal principles; the text of

[12] Ester Herlin-Karnell, *The Constitutional Dimension of European Criminal Law* (Hart Publishing, 2012), https://doi.org/10.5040/9781472566041.; Vico Valentini, "Continental Criminal Law and European Human Rights Law: A Complicated Relationship," *SSRN Electronic Journal*, 2013, https://doi.org/10.2139/ssrn.2352955.

[13] Váradi Erika Csemáné et al., *Magyar Büntetőjog: Általános Rész* (Budapest: Wolters Kluwer Kft., 2019), 68–70, https://doi.org/10.55413/9789632956282.

[14] Csemáné et al., 82–89.

environmental criminal offenses must be clear and intelligible, and they cannot be applied retroactively.

Europe and Its Environmental Criminal Law

This section outlines the prominent institutions that play a massive part in European policy-making and decision-making regarding climate change and environmental issues. The analysis will focus on how these institutions make efforts to combat climate change by adopting criminal principles.

a. Council of Europe

The Council of Europe is not the institution of the European Union (hereafter the EU). It was founded in 1949 and has 46 member states. Thus, the goals and objectives of this institution go beyond the EU. Its primary mission is to promote democracy and the rule of law and protect human rights in the member states. Among others, it also sets standards for facing future challenges of climate change and protecting the environment.

One of the most critical institutions established by the Council of Europe in 1959 is the European Court of Human Rights. It decides cases on the applications of individuals or states who claim the violation of human rights declared in the European Convention on Human Rights.[15]

Under the aegis of the Council of Europe, the *Convention on the Protection of the Environment through Criminal Law* was adopted in 1998 (hereafter the *Convention 1998*). The Convention firstly recognizes the relevance of the ultima ratio principle and states that the prevention of environmental damage must be achieved primarily through other measures, e.g., administrative law. However, it also recognizes that criminal law must be important in protecting the environment. Because environmental violations have serious consequences, criminal offenses must be defined by legislators of the member states to prevent such violations.

[15] Krisztina Karsai and Liane Wörner, "European Union and Council of Europe: Special Focus on Criminal Law," in *The Cambridge Companion to European Criminal Law*, ed. Kai Ambos and Peter Rackow, 1st ed. (Cambridge: Cambridge University Press, 2023), 3–29, https://doi.org/10.1017/9781108891875.003.

The Convention defines some intentional and negligent conducts that endanger or cause severe damage to human health, the environment, or the ecosystem. (For example, the unlawful discharge, emission of several substances or ionizing radiation into air, soil, or water, the unlawful disposal of waste, or the unlawful manufacture of nuclear materials.) It obliges member states to punish such crimes with imprisonment, financial sanctions, or reinstatement of the environment.

On 23 November 2022, the Committee of Ministers of the Council of Europe was authorized to negotiate with the Council of Europe, which aims to replace the Convention 1998 with a new convention. The Committee of Experts on the Protection of the Environment through Criminal Law (PC-ENV) was set up to achieve this goal. The Committee published a Feasibility Study[16] on the necessity of adopting a new convention. The Study emphasizes the fact that environmental crimes have extraterritorial effects. Thus, international cooperation must be strengthened in this field if member states intend to create a more effective protection of the environment.

b. The European Commission, The Council of the European Union, and the European Parliament

The institutions mentioned above are the most important decision-makers of the European Union. The Council of the European Union and the European Parliament negotiate and adopt legislative acts in most cases; the Council legislates mostly according to proposals submitted by the European Commission. The Commission proposes and implements laws to the EU treaties' objectives and principles and collects or evaluates inputs from public policy stakeholders; then, it integrates these claims and inputs into the law-making process. One of its main tasks is to ensure that laws are correctly implemented, evaluated, and updated in member states.[17]

As outlined above, the EU devotes a significant percentage of its efforts to protecting the environment. Criminal law is one of its most important "tools" in achieving this

[16] European Committee on Crime Problems (CDPC), "Feasibility Study on the Protection of the Environment through Criminal Law" (Strasbourg: Conseil de l'Europe, June 15, 2022), http://www.coe.int/cdpc.

[17] George Tsebelis et al., "Legislative Procedures in the European Union: An Empirical Analysis," *British Journal of Political Science* 31, no. 04 (October 2001), https://doi.org/10.1017/S0007123401000229.

goal. The result of this enterprise was the *Directive of 2008/99/EC on the Protection of the Environment through Criminal Law* (hereafter the Directive). The Directive aimed at defining the most serious and dangerous intentional or negligent activities to the environment as criminal offenses, such as the emission or introduction of several materials or ionizing radiation into air, soil, or water; collection, transport, recovery, or disposal of waste; production, processing, handling, use, holding, storage, transport, import, export or disposal of nuclear materials or other hazardous radioactive substances. The Directive obliges member states to ensure that such conduct (including aiding and abetting intentional conduct) constitutes a criminal offense, and the perpetrators will not escape prosecution and punishment. The Directive set similar goals and principles for combatting environmental crimes to the Convention 1998.

The European Commission evaluated the effectiveness of the Direction in 2019/20[18] and found many problems. The enforcement of criminal law on the level of police, prosecutors, and criminal courts was ineffective in the member states. The number of environmental crime cases successfully investigated and sentenced remained very low. The levels of sanction imposed were too low to be dissuasive. Cross-border cooperation should have taken place more systematically. Last, the Commission found that more reliable statistical data needed to be collected on environmental crime proceedings in the member states.

The Commission suggested the improvement of these fields and submitted Proposal[19] for a new directive that would be able to tackle the problem of environmental crime more effectively. The proposal suggests a refinement of the definitions of environmental crime categories. It adds new environmental offenses to its scope to ensure that serious offenses committed intentionally or with serious negligence are appropriately punished. It also introduces minimum and

[18] European Commission, "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 (Environmental Crime Directive)" (Brussels: Council of the European Union, October 28, 2020), https://commission.europa.eu/system/files/2021-12/environmental_crime_evaluation_report.pdf.

[19] European Commission, "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" (Brussels, December 15, 2021), https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52021PC0851.

maximum sanction levels for natural and legal persons. Moreover, it aims to facilitate cross-border cooperation and contains numerous provisions to strengthen the law enforcement chain. It obligates member states to transmit statistical data on environmental criminal proceedings.

The result of these endeavors of the EU is manifested in adopting a new direction for criminalizing environmental harm. The Directive 2024/1203 of the European Parliament and the Council on protecting the environment through Criminal Law[20] has replaced the previous directive, and it strives to "ensure a high level of protection and improvement of the quality of the environment." However, the effectiveness of its regulation in protecting the environment cannot be measured yet due to its recent adoption.

As can be seen, criminal law is an important tool in protecting the environment, and the EU expects that it has great potential to prevent serious environmental offenses.[21] However, it also can be observed that the EU and the Council of Europe intend to replace the current law in force (the Directive and the Convention 1998). The reason for replacing them is lack of effectiveness. Environmental crime has special features, and it seems that classic theories of criminal law and criminalization do not explain all the problems raised in this field. In the following chapters, I will briefly lay out some theoretical issues that must be addressed if our goal is to adopt a criminal legal system that is sensitive to the problems brought about by the pollution of the environment.

Behind the lack of success in legal solutions for environmental disasters are deeper problems that must be understood before we change the current legal system. This is also the case with environmental criminal law.

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[20] European Parliament and Council, "Directive (EU) 2024/1203 of the European Parliament and of the Council of 11 April 2024 on the Protection of the Environment through Criminal Law and Replacing Directives 2008/99/EC and 2009/123/EC" (Brussels: Official Journal of the European Union, April 30, 2024), https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:L_202401203&qid=1728291003951.

[21] Milena Ignatova, "Criminal Law Policy of the EU Countries in the Field of Combating Environmental Crimes," *Sociopolitical Sciences* 10, no. 6 (December 28, 2020): 42–48, https://doi.org/10.33693/2223-0092-2020-10-6-42-48.

Hungarian Experiences

The Hungarian Criminal Code (Act C of 2012 Criminal Code) includes criminal offenses[22], which aim to protect environmental values.[23] There are numerous offenses in the Criminal Code, the target of which is to prevent or punish conduct that is dangerous to the soil, water, air, animals, etc. However, evaluations of the effectiveness of criminal procedures concerning environmental offenses demonstrate that the number of prosecuted cases is low, and perpetrators mainly originated from disadvantaged society groups.[24]

Most of the offenses were committed by ordinary people, usually in their homes, and the special features of these perpetrators were that they were poor, with no or low level of education.[25] The intention behind their conduct, e.g., is to steal wood from the forest to provide sources for heating their house or steal electric cables and burn the plastic cover from them to sell the remaining aluminum.[26] We can infer from these facts that these kinds of perpetrators cannot understand the long-term consequences of their actions on the environment; the primary motivation behind their behavior is to satisfy their momentary needs (of money or similar interests).

However, it is not directly connected to environmental criminal law; it also causes concern that in 2023, the Hungarian government adopted a new decree[27], which introduced the concept of an administrative contract. This kind of contract provides the opportunity to "exchange" environmental sanctions for a contract with the administrative authority in which the company, which infringes its obligations prescribed by environmental law, can take the responsibility of restoring the damages caused by illegal pollution of the environment. The government regulation

[22] "Act C of 2012 on the Criminal Code, Chapter XXIII" (Budapest: Parliament of Hungary, 2012), https://thb.kormany.hu/download/a/46/11000/Btk_EN.pdf.

[23] Belovics Ervin, Molnár Gábor Miklós, and Sinku Pál, *Büntetőjog II. Különös Rész: Kilencedik, Hatályosított Kiadás* (Budapest: Orac Kiado, 2023), 358–82, https://orac.hu/buntetojog_ii_kulonos_resz.

[24] Zalán Zachar, "A Környezetkárosítás-Bűncselekmény Kriminálstatisztikai Mutatói És Az Elkövetők Szociálgeográfiai Vizsgálata," *Belügyi Szemle* 68, no. 1 (January 15, 2020): 34–44, https://doi.org/10.38146/BSZ.2020.1.2.

[25] Tamás Molnár, "Impressions on the Role of Environmental Criminal Law in Present Day Society," *Belügyi Szemle* 71, no. 2.ksz. (April 28, 2023): 93–103, https://doi.org/10.38146/BSZ.SPEC.2023.2.6.

[26] Zachar, "A Környezetkárosítás-Bűncselekmény Kriminálstatisztikai Mutatói És Az Elkövetők Szociálgeográfiai Vizsgálata," 43–49.

[27] Government of Hungary, "Decree of the Government of Hungary, Nr. 432/2023. (IX. 21.)" (Budapest, October 21, 2023).

also enumerates the sanctions that cannot be imposed on the company if it has signed a contract with the environmental authority.[28]

These circumstances demonstrate the fact that environmental legal obligations or prohibitions (prescribed by criminal or administrative legal norms) are still not taken for granted, or they are "beaten" by economic or political interests.[29]

In this situation, the EU's efforts to change the criminal legal regulation in member states are essential, but they remain ineffective. A holistic theory of criminal law must be established to slow down the consequences of climate change and prevent environmental disasters with criminal legislation. On the one hand, the current normative conceptions of the nature and function of criminal law must be revised, and it is important to reinterpret the concepts of criminal law in a way sensitive to the unique problems of environmental harm and damage. (I.e., the idea of harm or justifying principles behind criminalization, etc.)

The Causes Behind the Failure of Environmental Legislation

In the literature, considering the effectiveness of environmental regulations, there is a widely shared opinion that claims that environmental regulation has failed and is unsuccessful.[30] This notion concerns environmental criminal law and environmental regulation in general. The effectiveness of every regulative system depends on whether the system has achieved its goal. As Orsolya Bányai refers to the Hungarian professor László Fodor, the efficiency of environmental regulation depends on "how environmental conditions are improving,"[31] that is, in my interpretation, whether the regulative system successfully contributed to the decrease or slowing down climate change or environmental disasters.

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[28] Sandor Kerekes and Miklos Bulla, "Environmental Management in Hungary," *Environmental Impact Assessment Review* 14, no. 2–3 (March 1994): 95–101, https://doi.org/10.1016/0195-9255(94)90027-2.

[29] Gergely Horváth, "The Renewed Constitutional Level of Environmental Law in Hungary," *Acta Juridica Hungarica* 56, no. 4 (December 2015): 302–16, https://doi.org/10.1556/026.2015.56.4.5.

[30] Orsolya Bányai, "The Foundation of an Upcoming Civilization Able to Reach Its Fulfillment Within the Ecological Limits of the Earth: The Eternal Order," *World Futures* 75, no. 5–6 (August 18, 2019): 300, https://doi.org/10.1080/02604027.2019.1591812.

[31] Bányai, 302.

In my opinion, improving environmental regulation (administrative regulations or criminal legislation concerning climate change) desperately needs a deeper understanding of the causes behind the failure of environmental legislation all over the world. Orsolya Bányai outlines the most crucial problem behind the inefficient legislative attempts to keep the forecasted ecological disaster from escalating. The problem can be found in the beliefs and attitudes of the modern human being. In contemporary societies, humans think of themselves as not part of nature but superior to it; nature is under their control, and it exists only to put it to good use.[32] These beliefs and attitudes are reflected in and become part of societies' cultures and political and legal decisions. The goals and policies of modern political communities are drifting apart from the functions and structure of nature and the ecosystem.[33] "In general, environmental ethics scholars agree that the cause of environmental degradation is the worldview that distinguishes humans from the natural environment (duality) and supports the idea that humans can rule over it (domination).[34]

In consequence, the real problem behind the failure of environmental regulations is extremely complex. It originated in modern cultures, which represent the worldview of capitalism, the values of consumer societies, and technical improvements, where the political and legal systems serve the interests of powerful persons or institutions.

As Rob White puts it, "Law and order is fundamentally shaped by those groups and classes that wield the greatest social, economic, and political power, generally reflecting their sectoral interests."[35] This means that it is not enough to analyze the law and legal solutions on the surface; it is also important to understand the moral and political motivations behind the law. Regarding criminal law (and law in general), the focus must be on analyzing and understanding the interests and the

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[32] Anke Fischer, "On the Role of Ideas of Human Nature in Shaping Attitudes Towards Environmental Governance," *Human Ecology* 38, no. 1 (February 2010): 123–35, https://doi.org/10.1007/s10745-009-9281-y.

[33] Bányai, "The Foundation of an Upcoming Civilization Able to Reach Its Fulfillment Within the Ecological Limits of the Earth: The Eternal Order," 303.

[34] Bányai, 304.

[35] Robe White, *Climate Change Criminology*, New Horizons in Criminology (Bristol Chicago: Bristol University Press, 2020), 15.

power relations behind law and order. It seems that interests are about to maintain the *status quo.*[36]

This means that the scientific demonstration of the ecological crisis worldwide is widely known, and we are also aware of the solution, namely self-restriction in consumption. However, the interests of influential political and economic leaders are to keep human beings in the illusion that the fundamental values of life are grounded in producing and consuming as much as possible. Shortly, this attitude will not change; instead, it is becoming a more and more determinant feature of modern societies.[37]

As demonstrated by the unsuccessful criminal legislation in the EU, we cannot escape from going into a deeper analysis of the theoretical nature of criminal law and the justificatory grounds of its normativity. As mentioned above, criminal law must be an ultima ratio, a last resort to society's problems. Punishment can only be imposed on individuals when more lenient legal means do not effectively solve the problem. However, the example of the EU criminal legislation demonstrates that even the most potent legislative instrument was ineffective in changing modern human beings' minds and preventing environmental disasters. Thus, it is vital to create a theory of (criminal) law that is more sensitive to the problems of obligation to law in general.

In criminal law theory, there is a distinction between *mala in se* and *mala prohibita*. Both concepts refer to the reasons for criminalization. The *mala in se* offenses are criminalized because they are inherently wrong; they are considered inadequate by nature, and their wrongfulness is independent of and before their prohibition in law.[38] *Mala in se* include the most serious, dangerous, and violent crimes such as manslaughter or rape. *Mala prohibita* offenses are wrong only because they are prohibited by law; they are not inherently immoral; the wrongfulness of these

[36] White, 10.

[37] Bányai, "The Foundation of an Upcoming Civilization Able to Reach Its Fulfillment Within the Ecological Limits of the Earth: The Eternal Order," 299.

[38] Susan Dimock, "The Malum Prohibitum: Malum in Se Distinction and the Wrongfulness Constraint on Criminalization," *Dialogue* 55, no. 1 (March 2016): 9–32, https://doi.org/10.1017/S0012217316000275.

offenses is based on the fact that they are sanctioned by criminal law.[39] *Mala prohibita* offenses usually include drug offenses, anti-pollution environmental laws, or traffic regulations.[40]

The distinction between these concepts is quite controversial in Anglo-Saxon legal theory, and it is also a question of whether these concepts help explain the reasons for criminalization.[41] But for the primary purposes of this essay, they will be a useful starting point in grasping the nature of environmental crime.

As we have seen above, behind the failure of environmental legislation to prevent conduct that threatens and damages nature, there are special causes that are mainly connected to human attitudes toward nature. It would be easy to consider environmental crime as it falls under the category of *mala in se* offenses and to declare that such conduct is inherently wrong independent of being legally prohibited.[42] By polluting the soil, water, and air, human beings indirectly or directly cause serious harm to others. One of the main principles behind criminal law is the harm principle. As John Stuart Mill puts it in his famous book *On Liberty*: "…the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."[43] According to this idea, criminal law can only be applied against individuals if they cause harm to other individuals. The Hungarian Criminal Code defines the concept of crime (criminal offense): 'Criminal offense' means any conduct committed intentionally or - if negligence also carries a punishment - with negligence, which is considered potentially harmful to society and punishable under this Act."[44]

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[39] Mark S Davis, "Crimes Mala in Se: An Equity-Based Definition," *Criminal Justice Policy Review* 17, no. 3 (September 2006): 271, https://doi.org/10.1177/0887403405281962.

[40] Stuart P. Green, "The Conceptual Utility of Malum Prohibitum," *Dialogue* 55, no. 1 (March 2016): 33, https://doi.org/10.1017/S0012217315000025.

[41] Nancy Travis Wolfe, "Mala In Se: A Disappearing Doctrine?," *Criminology* 19, no. 1 (May 1981): 140–41, https://doi.org/10.1111/j.1745-9125.1981.tb00407.x.

[42] Ádám Mészáros, *A Bűncselekmény Fogalmának Alapkérdései: A Bűncselekmény Fogalma És Csoportosítása A Magyar Büntetőjogban* (Budapest: Országos Kriminológiai Intézet, 2020), 12–24, https://www.okri.hu/images/stories/konyvajanlo/2020/Meszaros/Mesz_A_web_sec.pdf.

[43] John Stuart Mill, *On Liberty* (Canada: Batoche Books Limited, 2001), 14, https://www.studocu.com/en-ca/document/university-of-winnipeg/government-policy-towards-business/mill-on-liberty-complete-highlighted/58682307.

[44] "Act C of 2012 on the Criminal Code of Hungary," Criminal Code § 4, Subsection (1) (2012).

If causing harm to others is an essential part of the concept of crime, it is inevitable to define the concept of harm as well. The definition of harm is a central issue in legal literature and criminal law theory. A classic definition was provided by Joel Feinberg, who states that harm, on the one hand, is a setback to interests and, on the other hand, is a wrongdoing. Only setbacks of interests can be wrong, and wrongs that are setbacks to interests can be considered as harms. In this context, interests represent individuals' stake in their well-being.[45] Of course, the well-being of human beings is a contested and controversial concept as well, which makes the objective definition of harm extremely difficult.

The classic and conventional concept of harm focuses on human beings and their interests, which concern their well-being. In the conventional idea of criminal law, the main purpose of criminal law is to protect human beings from harmful conduct. Criminal law is about the moral relationship between individuals and the state, which uses its power to constrain the liberty of its citizens.

As we can see, environmental damages caused by humans do not affect only human beings. They profoundly impact entire ecosystems and animals, which suffer from the results of these conducts. The classic conception of harm cannot explain the special features of environmental crime. First, some conduct causes serious harm to the environment. However, they are legally permitted. Most of these conducts are integrated into our everyday lives (driving cars, heating with gas, using air conditioners, producing food, etc.) or legalized by state institutions (like supporting the installation of battery plants regardless of their massive impact on the environment[46]). In the world's legal systems, we also can find numerous illegal or criminal environmental offenses because they are dangerous or harmful to the environment.[47]

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[45] Dennis J. Baker, *The Right Not to Be Criminalized: Demarcating Criminal Law's Authority*, Applied Legal Philosophy (London: Routledge, 2016), 42, https://doi.org/10.4324/9781315553481.

[46] Ferenc Gaál, "Hungary's Big Bet on Batteries — and Its Costs," dw.com, March 31, 2023, https://www.dw.com/en/hungarys-big-bet-on-batteries-and-its-costs/a-65193569.

[47] Rob White, *Environmental Harm: An Eco-Justice Perspective*, 1st ed. (Bristol University Press, 2013), 4, https://doi.org/10.2307/j.ctt9qgsq7.

The most important issue, then, is the justificatory basis behind governments' choice of criminalization. Is it possible to identify the relevant justifying reasons for criminalizing some actions? Is it possible to find the principles and values that help us understand and justify why some harm to the environment is illegal and why some serious harms and damages are legal or even supported by powerful state institutions or corporations?

Under the *nullum crimen sine lege principle*, crimes and criminal offenses can only be defined in clear and precise legal statutes, and punishment cannot be imposed on individuals whose conducts are not regulated by a previously declared legal norm.[48] Thus, as Rob White claims, regarding environmental crime, much depends on who defines criminal offenses and what interests and principles underlie environmental criminal legislation.[49] At least two kinds of attitudes can lie behind environmental legislation. One is human-centered, meaning protecting nature and the environment is instrumental and subordinated to human needs and interests. According to this approach, the function of nature and the environment is to serve human well-being. However, it is possible to adopt a different approach to environmental legislation, namely, accepting the idea that the existence of many species and ecosystems or nature has an intrinsic value. Protecting nature and the environment can be conceived as having an inherent value; it is worth protecting for their own sake.[50]

According to Robert A. Duff, "any normative criminal law theory depends on a political theory. Criminal law is part of the political structure of society: if we are to understand what criminal law should be or what it should do (what aims or functions it should serve), we must have some idea of the kind of polity in which it is to operate, of the guiding aims and values of such a polity, and of how a system of criminal law can serve those aims and embody those values." [51] From this perspective, criminal law is the reflection of a community's political morality.

[48] Ferenc Nagy, "A Nullum Crimen/Nulla Poena Sine Lege Alapelvről' (On The Principle Of Nullum Crimne/ Nulla Poena Sine Lege)," *Magyar Jog*, May 1995, 257–70.

[49] Nagy, 262.

[50] White, *Environmental Harm: An Eco-Justice Perspective*, 5.

[51] R A Duff, "A Criminal Law We Can Call Our Own?," *Northwestern University Law Review* 111, no. 6 (2017): 1492.

Political communities are built on institutions, moral and legal rules, social practices which "embody our understanding of what we owe each other." [52] Modern constitutional democracies build their societies on ethical and political values representing citizens' moral rights and obligations, the view on what we deserve, and how we must treat each other as citizens. Criminal law is a part of this ethical and political community; it protects these values by punishing those who disobey these moral demands. In sum, criminal law manifests a conception of justice in a political community. "The citizens of such a polity will be able to see such a criminal law as their law: as a law that reflects the civic values that they share or aspire to share and helps to secure the civil order in which they live together; as a law in whose enterprise they can play an active part."[53]

The idea defended by Duff explains the problems of criminal law from a wider perspective. It places criminal law in a broader context and interprets it in light of its justificatory values and principles. It argues for the claim that there are preexisting public moral wrongs that are condemned by every political community independent of criminal regulation. Criminal law must be adopted, interpreted, and understood according to these justificatory values.

CONCLUSION

According to the theorists who try to establish the grounds of environmental criminal law, this broader point of view must be extended in this study. Environmental criminal law considers human beings as members of a particular political community and part of a universal or global system of nature. Our moral and political obligations and rights are part of a broader justificatory context called "eco-justice."[54] This describes human beings as only one element (component) of nature; the fate of the ecosystems depends on human activity and *vice versa*; human beings' existence cannot be imagined independently of nature and the environment

[52] Duff, 1493.
[53] Duff, 1505.
[54] Petra. K Kelly, "The Need for Eco-Justice," *The Fletcher Forum of World Affairs* 14, no. 2 (1990): 327–31.

in which they live. Thus, in this theory, political citizenship becomes ecological citizenship, in which citizens have rights and obligations to each other and are responsible for the nature and environment in which they live.[55] Criminal law, in this respect, reflects justice for human beings, nature, and the environment.

If we adopt this conception of ecological "citizenship," it will have many consequences for criminal doctrinal scholarship as well. The concepts of crime, harm, criminal liability, punishment, etc., must be reconsidered to make environmental criminal law effective. Environmental criminal norms can only be made more apparent and more precise if legislators intend to go beyond the idea of political morality and step into the field of "ecological morality," which means that the focus of societal justice will not only be human beings but also nature and all of its components: environment, animals, and plants. Only humans' well-being is at the center of the law's attention. Environmental regulations will fail as long as nature is considered inferior to human beings and the environment can be exploited to serve human interests. Referring to Montesquieu above again, the goodness of modern criminal law depends on dispensing justice not only for human beings suffering serious harm from each other but for the entire nature suffering from human actions as well.

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[55] White, *Environmental Harm: An Eco-Justice Perspective*, 14.

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