Open a Path towards Sustainable Corporate Behaviour: Public Participation in Criminal Environmental Proceedings

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Abstract: Establishing criminal liability for environmental offences remains daunting, particularly with regard to the ‘no plaintiff—no judge’ element as a result of which the public seems to be ultimately deprived of the possibility to participate in criminal environmental proceedings. While there is arguably a lack of specific instruments at the European Union (EU) level which would prescribe such legal obligation on the part of the State, there has been a shift in understanding the role of the public and its participation in criminal liability cases, namely under the auspices of the so-called effective investigation and the concept of rights of victims in general. Using the example of the Czech Republic as a point of reference, this article aims to assess the relevant legal developments at both EU and Czech levels to illustrate why the non-governmental organizations (NGOs), essentially acting as public agents, should be granted an active role in environmental criminal proceedings. After examining the applicable legal framework and case law development, the article concludes that effective investigation indeed stands as a valid legal basis for human rights protection which incorporates an entitlement to public participation. Despite that, this pro-active shift is far from being applied in practice, implying that the legislation remains silent where it should be the loudest, and causing unsustainable behaviour of companies.

Keywords: sustainability; public participation; environmental offences; effective investigation; environmental law

1. Introduction

Despite the calls for increased corporate accountability for environmental offences which translated into a large number of environmental laws being adopted in the last decade, the practice has illustrated that where such environmental legal frameworks exist, they remain essentially on paper as they rarely lead to regular, complete and efficient enforcement [1–3], let alone criminal investigation and the imposition of penalties [4,5]. Indeed, while environmental law has been evolving dynamically and so have human rights, weak enforcement seems to be a recurring cause of environmental degradation which further aggravates environmental threats [1,6,7], underlining how difficult it is to achieve a positive change on the ground without the threat of an actual legal punishment, which in turn creates pressure on businesses to comply with environmental standards as a result of the deterrence effect among peers [8,9].

The current shortcomings of the environmental and/or criminal legislation, or rather the interpretation thereof, result in the unsustainable behaviour of companies, which often seek to maximize their profits at the expense of environmental protection [10,11]. As a result, when the economic benefits of non-compliance are contrasted with the costs of compliance, it often comes down to whether companies tend to comply on a large scale and what the chances of being caught are [12]. After all, a financial penalty can be perceived as a necessary cost for doing business [13]—and what are economic crimes if not professional crimes the purpose of which is unjust enrichment [14]. Accordingly, there is a reasonable assumption that the principle of sustainability, in other words the
ability to meet the living needs of not only current but also future generations, in a manner that preserves the diversity of nature and the existing ecosystems as much as possible [15], must be respected not only in environmental, but also in criminal law. The merits of environmental criminal offences are constructed to penalise infringements which fall under the category of attacks on ecosystems and the diversity of nature of the most serious character. Sustainability, therefore, constitutes an immanent part of environmental criminal offences, although only in the case of socially harmful conduct of a more significant degree. With regard to sustainability, criminal repression thus fulfils a double objective—it acts as a sanction for actions that affect sustainable development the most, but it also acts as a threat to entities, especially legal persons, which can avoid impairing sustainability in their decision-making processes when they decide on their approach to the environment, precisely with regard to the most severe threat of legal sanction.

It should be established at an early stage that despite the large number of environmental violations, there is only a low number of criminal environmental cases [5,16]. What is perhaps even more alarming, though, is that when there is an environmental criminal procedure, the public—assuming the position of an injured party or a victim of an environmental harm with implications for a larger part of the society—seems to be virtually deprived of the possibility to participate in it [17]. Public participation consists of rights that allow for a more effective investigation, in particular the right to access the case file, the right to make suggestions for additional evidence and the right to appeal against a decision to adjourn the case. By accessing the file, the public (through environmental non-governmental organizations (NGOs)) would, therefore, become acquainted with the factual situation and could respond to it accordingly with proposals for the taking of relevant evidence, including the submission of environmental expert opinions and reports. If the case is then adjourned, a legitimate complaint against the police authority’s decision and the subsequent reversal of the decision may force the police authority to investigate the criminal case further while being more thorough. Such scrutiny and active public participation in criminal proceedings significantly increases the likelihood of discovery and establishment of a criminal offence, and also implies an increased threat to the offending legal entities (by the very fact that criminal proceedings are consistently conducted with the control power of the NGOs), which could have a major impact on their future sustainable behaviour in terms of the environment. The absence of public scrutiny creates an obstacle in achieving a sustainable culture of compliance and environmental protection within the society. Indeed, the basis of sustainable behaviour is prosocial cooperation; that is, even though a certain practice may be costly for the individual entity, the benefits for the rest of the society simply triumph over it [18].

As a consequence, there seems to be a conceptual discrepancy between the purpose of environmental legislation which takes meaningful public engagement into consideration, as manifested inter alia through emerging court practice in particular countries from Nepal to the United Kingdom [19,20] and international human rights tribunals, but also through policy and institutional level [3], and the factual lack of access of the public to criminal procedures in cases concerning the environment. To elaborate, the basic mechanism applicable to establishing criminal or administrative liability is that the injured party (i.e., the victim) has a right to participate in the proceedings as long as he or she has been caused damage [21]. While the purpose of criminal law is to deal with attacks on the society of a state [22], the rights of individuals are not neglected as in criminal proceedings, since there is for instance the right to compensation in adhesion procedures [23]. It can thus be asserted that criminal law protects the society as a whole, but environmental crimes are those crimes in which no one stands on the side of the victim, which prevents the achievement of this purpose. Accordingly, in order to protect society, there seems to be room for other actors such as NGOs which have the potential to play a significant role in environmental cases. In this sense, there seems to be no legal ground or valid explanation as to why the environmental NGOs, essentially acting as public agents, should be excluded from participating in criminal procedure of environmental cases. Contrarily, there is a reasonable belief that
they should be granted the same opportunity to participate in the proceedings, and in the same manner as the injured party would in any criminal or administrative proceeding in a national court [22].

In fact, the public entitlement to participation in environmental criminal procedures should be even more substantial, given that environmental issues transcend borders, and are a source of concern to all citizens both from the affected area and beyond. Understandably, there is a common interest of the public for environmental offences to not go unpunished, too [6]. Despite the fact that the nature of criminal procedure is an important element which has implications on the process and outcome of a case, and which does not create any extensive burden on the State to apply in practice, the issue of active participation of NGOs in criminal environmental matters has been relatively omitted by legal scholars. That is to say, those researchers who address public engagement in criminal environmental cases do so at the level of lawsuit or filing a lawsuit, especially as regards the so-called public lawsuit (actio popularis) [17,24,25], they do not deal with the question whether the public can actively engage in the actual proceedings. The article argues that the realization of the right to a clean environment, in light of the principle of sustainability as a principle of international law, and especially in the context of corporate abuse, warrants reconsidering the legal basis on which NGOs could assume an active role in environmental criminal proceedings. This is also where the present article fits in the state-of-the-art discussion on public engagement in environmental matters as it places an emphasis on specific rights related to participation within the proceedings.

The article seeks to approach the issue of sustainability, which undoubtedly bears not only legal, but also economic (as a manifestation of long-term provision of the living needs of the population) and social (as an ethical concept) significance, from a somewhat unusual point of view that is concerned with criminal repression. Indeed, the criminal repression seems genuinely inadequate as far as the punishment for environmental criminal offences is concerned, and the article thus attempts to explain the reasoning behind why public participation in criminal proceedings is a worthwhile aspect of sustainability. It does so by pursuing the following structure: (1) the present introduction to the topic; (2) theoretical background and the state-of-the-art discussion; (3) methodological considerations; (4) analysis; (5) discussion; (7) concluding remarks. The analysis itself is further divided into the context of international law and European law including the right to effective investigation as formulated by the European Court of Human Rights, and the Czech criminal law framework. Using the example of the Czech Republic as a point of reference allows us to assess the relevant legal developments at both EU and Czech levels to illustrate why the environmental NGOs, essentially acting as public agents, should be granted an active role in environmental criminal proceedings.

The research question, therefore, could be characterized as follows: will public participation in criminal proceedings through the means of environmental NGOs increase the effectiveness of the investigation of environmental crimes by legal persons, thereby creating pressure on their sustainable behaviour? However, with regard to the mixed methodological approach of the article—that is normative legal analysis consisting primarily of finding the meaning that the addressees of the law assign to legal norms, complemented by a quasi-empirical approach examining the specific implementation of criminal liability for environmental crimes—there are certain limits which preclude it from being labelled as a social sciences research question stricto sensu. The analysis conceptually derives from the theory that the interpretation of legally binding documents is the key to the correct interpretation of the issue, followed by soft law and ethical concepts of responsibility, especially corporate social responsibility (CSR). The example of the Czech Republic seems to be well-suited for investigating the shift in the interpretation of environmental and/or criminal law as it provides a useful intersection in the European legal environment. The reasoning behind this choice is three-fold: (1) from a geographical point of view, it is a State located in the centre of Europe; (2) from the legal-historical point of view, its legal system is rooted in the German legal tradition; and (3) from the political point of view, it can be
considered as a representative sample of post-communist States entering the European Union (EU).

2. Theoretical Background and Literature Review

Most researchers in the field of international environmental law discuss the pressing need to protect the environment through more consistent and effective environmental legislation [1,6,26], underlining in particular the international recognition of the scale and gravity of environmental damage. While the specific strategies differ considerably from legal, policy and institutional instruments, increasing enforcement and compliance are common starting points for further considerations [27–29]. In parallel, corporate accountability for environmental human rights violations, environmental rule of law and legal regime as the ultimate tool to tackle corporate abuses or the obligation imposed on companies to apply supplementary tools such as human rights due diligence, has been extensively present on the scholarly agenda for the past decade [10,30–33]. It is also worth noting that the issue of sustainability has been gaining increasing importance in the academia, be it through the means of the United Nations Sustainable Development Goals (UN SDGs) or the CSR [34,35]. The CSR can be definitely considered as a somewhat umbrella theory which is closely intertwined with considerations of responsibility towards the society, environmental protection or even criminal accountability. In particular, the CSR has put companies under pressure to meet ethical standards, and not to be primarily concerned with profit [36]. The research in the field of ethics and CSR has been focused on the activities of companies as well as the value systems that are the basis of their business activities. These studies demonstrated that working conditions and activities in support of the environment are among the most important corporate responsibilities, followed by community development and transparency activities [37,38]. Some researchers focus on more practical aspects relating to sustainable corporate practices in the field of the environment. For instance, Dixon et al. emphasize that environmental disclosure of corporations remains very low, even though environmental initiatives have been put forward to create a convenient environment for them to address environmental issues, the growing pressure from stakeholders, however, makes it difficult [39].

An emphasis has been also placed on the criminal dimension of environmental violations. Namely, in a book from 2015, Pereira advocates for the strengthening of the institutional framework for environmental protection as a means to harmonize national environmental criminal standards across the world, emphasizing that the institutions must find a way to criminalise environmental harm without compromising national sovereignty in criminal matters [4]. Faure and Heine explore the criminal liability of companies for environmental offences in both administrative and criminal jurisdictions, while essentially raising the question of how far the European Union should go in harmonizing the criminal environmental law enforcement in its Member States. Among other things, the authors point out the trend of a slowly increasing number of criminal sanctions as a result of the Commission’s pressure to condemn environmental violations of intentional or negligent character by treating them as criminal offences [5].

At the UN level, it is worth noting that the First Environmental Rule of Law Report was published in 2019 with the aim to address the growing gap between environmental legislation on one hand, and its implementation and enforcement on the other. The authors of the report argue that while environmental laws have provided the much-needed framework for environmental protection and have effectively slowed down environmental degradation, the standards to which the laws ultimately gave rise to are insufficiently clear, there is inadequate focus on obligatory mandates, and the country-specific situation on the ground is not duly considered. Interestingly, the report underlines the need for businesses to behave sustainably and mentions the role of civic engagement as a mean to create awareness of the content of environmental legislation or a mean to influence policymaking [1]. However, there is no direct link established to public participation in criminal procedures as a tool to effectively carry out the right to clean environment. In
fact, the only reference made to public engagement in criminal environmental matters is connected to the support of prosecutorial initiatives by enhancing the deterrent and punitive effects of environmental offences through an informed and engaged public which reports environmental violations, offers evidence and creates negative publicity for the corporations which are liable [27].

As far as the rights to clean environment and public participation in the Czech legal environment are concerned, the most prominent academic research on environmental law is produced by the Czech Society for Environmental Law, which publishes the Czech Environmental Law Review as a result of joint efforts of the Department of Environmental Law of the Law Faculty of Charles University in Prague and the Department of Environmental Law and Land Law of the Law Faculty of Masaryk University in Brno. An overview of the research on environmental law was then produced by a team of researchers led by Damohorský [40], while a significant contribution touching upon the right to a clean environment and the right to public participation as one of its manifestations was published by Müllerová et al. [17]. Moreover, the issue of criminal liability has been discussed in a unique publication by Jančářová et al. [41], which provides a complex account of environmental liability, and yet sufficiently acknowledges its criminal law dimension.

Finally, it should be noted that the emerging case law of the Constitutional and Supreme Courts of the Czech Republic significantly assists in shifting the understanding of the right to a clean environment and public participation in line with the EU legislation, the Aarhus Convention and the UN Framework Principles on Human Rights and the Environment. In essence, based on the obligations arising from the Aarhus Convention, the applicable legislation and case law of the higher courts together with the findings of academic research, it is possible to identify an obvious shift in understanding the need for public participation—in this case environmental organizations—in administrative proceedings. However, in terms of criminal liability and criminal procedure, no such attempt to apply the right to public participation has been detected, either through legislation or court practice, or through academic research. In order to assess the criminal dimension of environmental protection which is, therefore, only covered to a limited extent in selected periodicals, the commentaries relating to the Czech Criminal Code are particularly relevant sources of information. For one thing, the lack of literature relating to the criminal procedure for environmental offences can be explained by the fact that in the field of environmental law, rather administrative than criminal proceedings take place at the level of national courts.

3. Method

This article seeks to present a rather unique cross-disciplinary approach to the issue of environmental sustainability from the perspective of law. In accordance with the established research practice in legal sciences, the methods of analysis are essentially non-empirical in nature, based on deductive procedure and reflecting the principles of formal logic [42]. The essence of the research aim is to achieve a deductive and logically indisputable analysis of the legal normative arguments in question by following the methods of finding and interpreting the law described below. While a normative analysis of the law is a common research approach in legal science, it should be noted that it is no longer the sole method, and that the knowledge of empirical facts can lead to the realization of substantive fairness [43]. Bearing this in mind, the normative analysis of law brought forward in this article is further supported by empirical data, which bring evidence of the commission of environmental crimes and thereby situate the analysis in context. Even though the chosen methodology is, therefore, not common in social sciences [42], it is a valid methodological approach with regard to the research topic. Importantly, looking at the issue of sustainable corporate behaviour from a legal perspective could offer a different and potentially valuable normative perspective, which can be used as a starting point for further empirical studies.
In order to carry out the analysis, and more specifically, to interpret the law in a way its intended meaning and objective are respected, the objectively recent approach to legal interpretation, which seeks to determine how today’s addressees understand the legal rules and what their role in society is, is put forward. As opposed to that, the subjectively historical interpretative goal, which remains faithful to the meaning of the law given at the point in time when it was initially created, is surpassed [44]. The objectively recent approach perceives a boundary between the interpretation itself—that is the broadest possible linguistic meaning of the term—and the “completion” of the law through creation of the law by analogy [45,46]. The primary goal of the interpretation is thus to find the meaning that legal addressees attribute to legal concepts (objectively recent interpretation) through objectively teleological arguments aimed at preserving the value consistency of the legal order on one hand, and formally systematic arguments that complement the context of linguistic meaning on the other [47].

The interpretation which ultimately respects the conformity of values and the contextualization of the legal norm in question within the legal system and taxonomy of the national legal order, while respecting both internationally binding obligations and national constitutional requirements, is a key element to the process of interpretation. Furthermore, a constitutionally conforming interpretation takes precedence over an unconstitutional one, even if the conforming one is contrary to the intention of the legislator [48]—in other words, contrary to the subjectively historical interpretative goal.

In criminal law, the principle of legal certainty includes the rule in dubio mitius, which means that in case of doubt, a more favourable interpretation to the person accused of a criminal offence should be applied. If the basic methodological approaches do not lead to an unambiguous interpretation and there are still at least two different possibilities of how to interpret the law, then this rule can be applied as an expression of the principle of legal certainty [23]. If, in any case, the intended result is still not achieved within the range of interpretation, it is possible to proceed to the creation of the law by analogy or teleological reduction. In the field of criminal law, the possibility to create the law is significantly limited, especially as regards the merits of a criminal offence [46,49]. Taking the nature of criminal law into account, the prohibition of analogy or teleological reduction to the detriment of the offender is a pertinent rule which cannot go the other way around. To elaborate, as a result of international obligations seeking to criminalize particular acts, it is not possible to apply analogy in the context of offences which infringe upon the fundamental human rights in favour of the offender.

4. Analysis of Public Participation in Criminal Environmental Proceedings

4.1. Environmental Protection and Public Participation at the European and International Level

The incentives to articulate the link between environmental protection, sustainable development and accountability for environmental human rights violations is present in particular at the UN level. In terms of public participation as such, the UN Framework Principles on Human Rights and the Environment explicitly lay down “the obligation of States to provide for and facilitate public participation in decision-making related to the environment and take the views of the public into account in the decision-making process” in Framework Principle 9 [50]. At the decision-making level, this principle, therefore, refers to public engagement and active dialogue in the course of development of policies, laws, regulations and even projects, building on the argument that these documents should be consulted with the representatives of the general public which is essentially affected by them. In this sense, the purpose of the principle is to protect the rights which by their nature depend on clean and sustainable environment, that is as a prerequisite for the realization of other rights. Accordingly, if the right to clean environment is for some reason not guaranteed, nor can be other rights intertwined with it as a result of them being mutually exclusive [50]. Another level of the principle consists in providing the public with all necessary information relevant to the proposals being discussed, whereby the information should be communicated to the public in a timely, effective, objective and understandable
manner; and the public should be able to, either in person or via representatives, comment on or inquiry about the specific aspects of proposals which affect the environment—these aspects can, however, be denominated as procedural environmental human rights, not as substantive rights [50]. The above argument that the public should be presented with an adequate opportunity to express its views on the matter assumes an active role in the decision-making process.

Similarly, under the Framework Principle 10, there is an “obligation of States to provide for access to effective remedies for violations of human rights and domestic laws relating to the environment” [50]. The principle encompasses the duty of States to ensure that individuals have access to effective remedies against private actors who failed to comply with environmental laws, which resonates with corporate accountability for environmental damage even though the document seems to be lacking specific references to the role of businesses as such. Furthermore, individuals should have access to judicial and administrative procedure related to environmental violations which respects basic judicial guarantees such as right of appeal to a higher judicial body [50]. In this manner, there is an understanding that any person who suffers from environmental harm has the right to seek effective remedy in court. Assuming that a truly effective remedy can be only achieved through a criminal procedure which gives rise to actual penalties, nothing in the wording of the principle suggests that the same rights could not be transposed from administrative proceedings to apply to criminal proceedings as well.

On a different note, the UN Guiding Principles on Business and Human Rights set out the duty of a State to protect human rights, not in the sense it would make the State liable for abuse by private actors, but imposing measures to prevent such abuse from happening in the first place, and investigate, punish and redress potential violations including through the mean of adjudication [51]. States are under an obligation to enforce laws concerned with the respect of business enterprises for human rights while addressing any possible gaps at the legislative level and, in terms of access to remedy, they specifically mention criminal procedure as one of these remedies. As for the role of the public, there is a limited right of information arising from the principles as well as a requirement on the part of States to facilitate public awareness [51]. Even though it should be pointed out that either of the UN Guiding Principles is not per se a binding source of law for the national legislator, they clearly express the will of the international community for the public to assume an active role in the deliberations on climate protection and to have a possibility to seek justice for environmental human rights violations.

Nonetheless, the key legislative basis setting out the rights of the public, individuals and their associations alike with regard to the environment is the Aarhus Convention. In general terms, the Convention lays down the right to access to environmental information, the right to participate in environmental decision-making, and the right of access to justice. From the perspective of the role of the public, Article (Art.) 6 regulates “public participation in decisions on specific activities” whereby it provides ground for the “effective participation” of the public and of the “public concerned”, which could be interpreted as NGOs dealing with the environmental agenda.

At the EU level, the Council Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law underlines the need for an increased criminal liability for environmental violations, setting out the liability of legal persons pursuant to Art. 6. Similarly, the Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC provides a legal basis for the right of the public to access information about the environment as a prerequisite for more effective participation by the public in environmental decision-making. Finally, 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 seeks to provide a more effective protection of the environment through criminal law by creating an obligation to establish criminal liability
4.1.1. The Criminal Procedure in Practice: An Emerging Conceptual Discrepancy?

The policy-making and legislative action at the European level has illustrated that effective enforcement of environmental standards is an integral component within the wide range of the Union’s objectives, and that the rate of criminal sanctions for violations of environmental law has grown considerably in the Member States [5]. EU institutions have been actively promoting enforcement by referring to different procedural measures and actors, which suggests a tendency to include the general public in the decision-making, monitoring and also administrative and criminal proceedings. In fact, the EU Commission has been “undertaking efforts to ‘outsource’ enforcement to environmental non-governmental organisations (NGOs) by systematically promoting access for such groups to national courts” [3].

Notwithstanding the legally binding force of both national and EU environmental laws, criminal enforcement in EU Member States still faces many challenges in practice, which can be partly linked to a global increase in environmental pollution and malfunctions in business enterprises [5]. The common denominator behind the insufficient achievements of criminal environmental cases is arguably the fact that the victim of an environmental crime is essentially missing [52]. The element of a victim has been a key element in criminal law which entails specific considerations, but the nature of environmental damage does not permit pinpointing a specific person suffering the consequences, which in turn creates a gap with further procedural difficulties [52]. As a matter of fact, the injured party is not present in the proceedings relating to environmental criminal offences even when a large number of individuals is at risk. The rights of environmental NGOs relate to environmental dimensions of projects and proposals, they are entitled to raise public awareness and engage in public campaigns, but when it comes to establishing criminal liability and deciding on penalties, there is a red line which NGOs cannot cross. However, both international and European regulations recognize the importance of public participation, suggesting that there is a conceptual discrepancy between what the EU is officially trying to uphold by underlining the role of the public in its environmental framework, and the actual access of the public to criminal procedure in environmental cases which could make all the difference.

It is important to note that in most EU Member States, there is no such right of public participation in criminal proceedings concerning the environment enshrined in the national legislation. The only exception is somewhat the case of Portugal, whose entitlement to public participation is carried out via an actio popularis recognized by the Portuguese Constitution [25]. The actio popularis is delineated as a public interest litigation of penal character brought by a member of the public in the interest of the general public order, as is the case of the environment which inherently has the status of a shared interest. While some other Member States do provide grounds for actio popularis, too, the legal standing—i.e., the entitlement to bring a legal claim in front of a court to protect the right or interest of the claimant—remains dependent on either the manifestation of a right impairment or a sufficient interest which would authorize the person to act [24]. For example, in the case of environmental violations, the element of geographical proximity of the claimant could be considered, and the mere interest of a concerned citizen would not be sufficient grounds. In any case, the function of such actio popularis is linked to the challenging of a certain legislative act, not as a means to participate in a criminal procedure for a specific violation as such [25]. In this sense, it does not illustrate a shift that would occur already at the level of the Member States, but it underlines the reasoning behind the need for public participation in such cases. On the other hand, there might be country-specific incentives to widen the scope of the public engagement through the intermediary of environmental NGOs. However, these isolated attempts seem to provide only a limited opportunity for
the environmental associations to “assist” in cases of environmental criminal offences, such as in the case of Spain [17].

Finally, although the EU security aspects are the least impacted by it, according to Art. 4 of the Treaty on the Functioning of the European Union, the environment is still among the shared competences of the Member States and the Union, which implies that there is a possibility for the EU to interfere and “adjust” the national level through adopting a directive which broadens the scope of the national legislation. Considering that the environment is a global good which legitimizes its addressing at the Union level—and while acknowledging that establishing criminal liability is an effective tool to ensure environmental protection, the EU should consider providing the environmental NGOs with the right to participate in environmental criminal proceedings as representatives of the public will through a directive. Adopting a directive does not seem to be an impossible task, and yet directives have the character of binding legal force which seeks approximation of national legislation, the matter of transposing resting ultimately on the Member States which are given a specified timeframe to do so [53]. In light of the binding force of this instrument and ability of the Member States to transpose the law as they see fit, it seems a directive could be a non-conflict and effective solution pushing the national legislators to re-interpret the role of the NGOs in environmental criminal proceedings.

4.1.2. The Case Law of the European Court of Human Rights as an Additional Layer of Environmental Protection

The European Court of Human Rights is a supreme judicial tribunal dealing with human rights violations at the European level and perhaps the most effective international court on human rights in the world, obliging the contracting States to respect the European Convention on Human Rights and, by extension, to acknowledge the binding effect of its case law in the national jurisdictions [54]. In relation to the aim of this article, the Court preserves the rights of victims, and grants an additional layer of protection in cases of violations of Art. 2 (right to life) and Art. 8 (right to respect to private and family life), which is manifested through its extensive case law on the right to effective investigation as an inherent procedural right [55].

As early as in 2008, in the case of K.U. vs. Finland concerning the failure of the Finnish authorities to protect a person’s right to respect for private and family life as enshrined in Art. 8 of the Convention, the Court held that private life is defined as a moral and physical integrity, which relates not only to the interference of public authority, but even to interference among individuals [56], which is an important leap towards establishing the scope of the right to effective investigation even in the case of private life. The Court further recognized in Osman vs. the United Kingdom that the right to effective investigation may be established even if the physical integrity of an individual has been infringed by another individual, irrespective of whether it was a result of exercising public authority, which is a common cause for triggering the right to effective investigation [57], and which has far-reaching implications for the application of this right to legal persons. Importantly, public authorities are usually not the perpetrators of environmental offences, the legal persons are. Accordingly, at the conceptual level, it makes sense for environmental offences committed by legal persons to be investigated in the most effective way possible.

In Vasyukov vs. Russia, the Court allowed for the right to effective investigation to arise even when an infringement in the physical integrity of a lower intensity occurred, assuming that there was a combination of factors relating to the vulnerability of the person which warranted such interpretation [58]. Even though in this particular case the reasoning behind “vulnerable” position of the victim consists in some form of dependence [58], if a more extensive interpretation is applied it could be argued that the victims of environmental violations are put at the mercy of the violators with only a low chance of achieving justice, which puts them in a vulnerable position. Once again, where there is no plaintiff, there is no judge, and the question of sanctions is ultimately left on the party which is not the victim, i.e., the State. In the end, Vasyukov provides grounds for the claim that there is no...
need for brutal violence in order to trigger the right to effective violation, but the context of a position of power versus a position of weakness is a relevant consideration.

All things considered, the traditional principle of criminal law whereby there is a perpetrator and a State, and the injured party can only enter the proceedings if he or she suffers damage, does no longer uphold. The case law of the European Court of Human Rights manifests a shift in understanding the right to effective investigation where, as long as life itself and private and family life is involved, there is a tendency to grant the right to participate in the proceedings to the injured party thereby enabling him or her to influence the outcome of the case. While the right to effective investigation is recognized in cases where the injured party is directly concerned, environmental harm arguably has a global impact on the life and private life of many individuals, so the legislation should develop accordingly to reflect this by allowing the representatives of the public to enter the proceedings. In other words, environmental NGOs should be able to take part in the proceedings which are of interest to society as a whole.

The judgments of the European Court of Human Rights definitely follow a pattern which advocates for an increased environmental accountability. The shift in the Court’s interpretation of the right to effective investigation in those cases which are directly touching upon the life and private life of the individual by extension also gives rise to the right of effective investigation in cases where indirect interference with the life and private life occurs. Even though there are no environmental criminal cases to put forward, it is precisely due to the fact that if there is no injured party in such cases at the national level, there cannot be cases at the Court level either. Nevertheless, it does not make sense to distinguish between criminal offences which interfere directly with the life and private life of a specific person on the small scale, as opposed to environmental harm which concerns the indirect interference with life and private life on a significantly larger scale. Although the connection between private life and the environmental offence in question may not appear at first sight, it is inherent in the nature of the offence, which has an impact on a number of individuals. Accordingly, there is no reason why the possibility to participate in the proceedings should be adversely affected at the expense of the absence of a specific injured party.

4.2. The Right to Public Participation Applied to Criminal Proceedings in the Czech Republic

4.2.1. The Right to Favourable Living Environment and Public Participation

In accordance with the European and international commitments, the right to a clean, or in this case “favourable” environment in the Czech Republic is laid out at the constitutional level through Art. 35(1) of the Charter of Fundamental Rights and Freedoms, which further provides for the right to “timely and complete information about the state of the living environment and natural resources” under Art. 35(2). The constitutional level of protection is complemented by the right to life (Art. 6(1) of the Charter) and to respect for private and family life (Art. 10(2) of the Charter), which is important to underline in relation to the right to effective investigation. The key document which regulates and expands the right to environment (including the right to public participation), has the character of an international treaty and it is the Aarhus Convention. The Convention is an authoritative source for the interpretation of the right to public participation in cases concerning the environment at the level of the Constitutional and Supreme Administrative Court of the Czech Republic.

At the legislative level, in terms of access to environmental information as a precondition for participation, Act No. 123/1998, on Access to Information on the Environment sets out the scope of information to which the public is legally entitled. That being said, other legal acts mostly lay down the basis for environmental associations to have access to information and to be able to participate in different kinds of administrative proceeding such as environmental impact assessment (including follow-up proceedings) in the sense of Act No. 100/2001 Coll.; in proceedings affecting the interests of nature and landscape protection in the sense of the Act No. 114/1992, on nature and landscape protection, or
in proceedings on the imposition of preventive or remedial action in the sense of Act No. 167/2008 Coll., on prevention and remediing environmental damage. Therefore, if public participation in the proceedings concerning the environment is to be assessed, there is only a limited possibility to participate in some administrative proceedings, primarily through the intermediary of ecological associations [59] while in criminal proceedings, there is no such possibility regulated by the law.

4.2.2. Environmental Criminal Offences and the Rights of Victims and Offenders

The formation of environmental criminal offences has been largely influenced by the European legislation, especially as regards the codification of the criminal liability of legal persons, which is more or less the result of coming to terms with EU legislative requirements, for which the need for legal persons to be punished for environmental criminal offences was a fundamental must [60].

The scale of the criminal offences against the environment (§§ 293–308 of the Criminal Code) ranges from protection of the individual components of the environment to the protection of the environment as a whole. Concerning the merits of environmental cases, it is quite common that due to the nature of the subject under attack, in this case the environment, it is not possible to identify a specific victim of the particular criminal offence. Nonetheless, the nature of the offence also makes it clear that the society is affected as a whole, even without examining the objective aspects of the consequences in relation to a specific person concerned. As a result, there is no pressure on the part of the State for carrying out a proper investigation of the offence that would be otherwise provided by the injured party should there be an injured party identified in the proceedings [21]. This discrepancy translates into an unbalanced standing of the public, which is substantially affected by environmental violations, and which at the same time lacks the ability to take part in the investigation. While looking at Table 1, therefore, it is not surprising that, with the exception of poaching and animal cruelty, which are not directly related to sustainability and are not reported as environmental offences, the number of registered environmental offences is low and their clearance rate even lower. This is particularly clear when compared to economic crime, under which environmental offences are formally classified.

| Table 1. Registration and clearance rate of environmental offences. |
|---------------------------------------------------------------|
| | 2016 | 2017 | 2018 | 2019 | 2020 |
|----------------|------|------|------|------|------|
| Number of Economic Crime Cases Registered | 28,306 | 26,294 | 24,837 | 24,589 | 18,528 |
| Number of Economic Crime Cases Clarified | 15,605 | 14,238 | 13,298 | 11,898 | 8,062 |
| Number of Environmental Offences Registered | 29 | 30 | 44 | 54 | 57 |
| Number of Environmental Offences Clarified | 10 | 6 | 24 | 28 | 17 |

Source: Czech Police Records.

On a different note, the character of environmental crimes which makes it difficult to identify a specific victim of an offence further leads to a higher rate of latency of environmental criminal offences [14,61], as there is an increasing number of environmental issues not being brought up altogether, and which could have been reported under more favourable circumstances for the public. Importantly, some environmental damage can take a long period of time to fully manifest, and by that time it is too late to take action. From the perspective of the right of the victims, it is simply impossible to wait until the violation becomes “serious enough” to entitle the affected person to seek justice while the company responsible for the damage continues to operate unsustainably.
Another aspect worth considering is the higher occurrence of fault in the form of negligence which can be perceived as an imaginary shift towards criminal liability of legal persons. This is based on the concept of attribution, implying that if a criminal offence is committed by a natural person acting on behalf of a legal person (§ 8 para. 1 points (a) to (d) and para. 2 of the Act No. 418/2011 Coll., on the Criminal Liability of Legal Entities), in the interest or within the scope of activity of the legal person (§ 8 para. 1), the offence is by extension attributable to the legal person as well. However, given the connotations related to the concept of liability of legal persons in private law as contrasted to the nature of criminal liability, using the term “accountability” seems to be better suited and concise than the term “attribution”. In any case, this form of responsibility cannot be characterized as subjective responsibility (as fault), nor directly objective (as result), although the latter would be more appropriate. Furthermore, Jelínek states that in case of fault of a legal person, a breach of compulsory professional care should serve as a basis, the fault of a legal person being precisely the “neglect of due care” [60]. The introduction of criminal liability of legal persons was also associated with a strong expectation in relation to effective punishment for environmental criminal offences which, however, based on the statistical data of convicted legal persons from the Czech Republic as evidenced by Table 2, did not translate into reality.

Table 2. Criminal activity of legal persons 2013–2019.

| Criminal Activity of Legal Entities | Period         | 2013–2014 | 2015 | 2016 | 2017 | 2018 | 2019 |
|------------------------------------|---------------|-----------|------|------|------|------|------|
| Fraud (§§ 209–212, § 260)         |               | 49        | 85   | 108  | 37   | 45   | 50   |
| Tax reduction (§ 240)              |               | 23        | 37   | 51   | 19   | 30   | 41   |
| Non-payment of mandatory benefits (§ 241) |       | 60        | 77   | 62   | 29   | 47   | 20   |
| Accounting distortion (§ 254)     |               | 9         | 16   | 24   | 19   | 21   | 16   |
| Criminal offences related to public contracts (§§ 256–257) and corruption (§§ 329-334) | | 5         | 10   | 37   | 6    | 0    | 0    |
| **Criminal offences against the environment (§§ 293–307)** | | 1         | 2    | 1    | 0    | 1    | 1    |
| Other criminal offences            |               | 1         | 5    | 8    | 2    | 20   | 32   |
| **TOTAL**                          |               | 156       | 238  | 262  | 112  | 174  | 160  |

Source: Czech Justice System Infodata.

The statistical data documenting the insufficient legal penalties for environmental criminal offences, and even the catastrophic absence of punishment for legal persons can serve as an additional evidence of a non-normative nature. Importantly, similar findings were found by researchers across Europe. For example, Lynch et al. pointed out to the low number of criminal penalties for environmental crimes in Ireland—for the examined period of 11 years, it can be concluded that there were about 14 environmental punishments per year, which is disproportionate to other offences. At the same time, the majority of offenders in question were corporations [16].

In accordance with § 43 par. 1 of the Criminal Procedure Code, the injured party of a criminal offence is defined as “a person to whom was caused bodily harm, material damage or non-material harm by a criminal offence, or those at whose expense has the offender enriched himself by a criminal offence’. The definition of a victim thus depends on the connection, which has to be established with the consequence of a criminal offence, either a damage or harm. In essence, the injured party can be associated with a person whose interest protected by criminal offence was harmed [62]. In relation to environmental criminal offences, however, the key delimitation is the phrasing in § 43 para. 2 of the
Criminal Procedure Code, which states that a person whose damage has not been caused “in causality with the criminal offence” cannot be perceived as an injured party.

The consequences of the offences against the environment are contrastingly manifested in the long-term, and on all the persons living in the affected area, so a more extensive interpretation of the term “injured” party should be considered, expanding the traditional understanding of damage in criminal law [63], so as to include indirect damages incurred as a result of direct damage [64]. If the nature of the damage were in question, it could be considered non-pecuniary damage, which means an intervention which is objectively capable of causing a consequence consisting in a violation or a threat thereof of the personality of the individual as far as his or her physical integrity is concerned [65].

The injured party in a criminal case has a number of rights which, apart from the right to compensation, resemble considerably those related to the right to public participation as laid down in the Aarhus Convention. Those include the rights of information character (notification obligation of the law enforcement authority under § 158 (2), the right access to the case file under § 65 para 1 of the Criminal Procedure Code, etc.) and rights which impact the course of the criminal proceedings (the right to request a review of the enforcement authority’s procedure by the public prosecutor pursuant to § 157a (1), the right to propose evidence pursuant to § 43 (1), the right to complain against adjournment pursuant to § 159a (7) of the Criminal Procedure Code).

In addition to the term injured party of a criminal offence, the Act No. 45/2013 Coll., On Victims of Crime, further implemented the concept of a victim of a criminal offence, which, in contrast to the injured party’s emphasis on procedural rights, lays down rights of information character, protection and assistance to persons affected by the offence. To put it simply, and for the purposes of the present analysis, it is sufficient to state that any injured natural person who declares that he or she feels as a victim of an offence, is indeed a victim (§ 3 (1) of the Act on Victims of Crime).

Therefore, it is not surprising that the right of the injured party to an effective investigation has been implemented into the Czech legal system as a result of the case law development at the level of the European Court of Human Rights. The Constitutional Court interprets this right primarily as a requirement directed at the enforcement authorities in criminal proceedings to make a qualified effort to clarify any suspicions of committing a criminal offence [66]. At the same time, this right should apply only to those criminal offences whose impact is comparable to an interference with the right to life [67]. In the case of misdemeanours, less serious categories of criminal offences that is to say, the application of this right is possible only in exceptional circumstances in cases of extremely flagrant errors with severely intense and persistent consequences for the injured party [68]. Environmental criminal offences are, however, regularly followed by persistent, long-term and severe consequences on the lives of citizens, albeit difficult to measure, so if the same logic is to be applied, the right to an effective investigation should also apply to these cases.

4.2.3. Public Participation as a Manifestation of the Right to Effective Investigation

Private law perceives the purpose of protection in upholding the principle of corrective justice, implying that justice will be served “between two people”, whereas public law understands it is an expression of global justice shared by the entire society, as a protection of “all those values that can be shared among citizens of an organized state” [68]. This by no means suggests that liability in public law neglects the individual interests of persons, but it is linked to the principle of welfare, a social context that “gives weight to collective goals” [22]. The purpose of criminal liability, as an expression of the ultimate coercive means of public law is, then, punishment for the violation of values shared by society and the general public. In fact, societal justice as the essence of the substantive level of rule of law is at the heart of criminal law’s intentions [69].

The essence of criminal liability if compared to the right to information and public participation, presupposes that environmental protection is in the public interest and everyone should be provided with the possibility to take an active part in it as a manifestation of
the right to a favourable environment [40], it seems clear that in the absence of a specific
injured party of an environmental criminal offence, and in light of the requirement of
the right to effective investigation dependant on the threat to life, moral and physical
integrity as a result of the offence, it is necessary for environmental associations to be able
to carry out the procedural rights of the injured party (with the exception of the right to
compensation, of course). Such a development could be perhaps achieved through a more
extensive interpretation of § 43 (2) of the Criminal Procedure Code by assessing the nature
of an environmental criminal offence as a crime that causes harm to citizens of a given
territory or a State. The ecological association—an environmental NGO—would then be a
logical representative of the interests of society and, therefore, would enjoy the procedural
standing of an injured party. Such an interpretation also preserves the value consistency of
the legal order of the Czech Republic as it is an adequate expression of justice shared by
society from the entitlement of the essence of criminal liability in public law.

With reference to the case law of the European Court of Human Rights, and particu-
larly its interpretation of the right to effective investigation, the extensive interpretation is
also in line with formally systematic arguments as an alternative interpretation conforming
to constitutional and international obligations. In practice, however, it is difficult to expect
such a fundamental change to be applied directly in court practice, even though there is
no formal legal obstacle preventing this shift from being transformed into practice. In
order to embrace the right of public participation in criminal environmental proceedings, a
legislative change, therefore, seems to be a more authoritative solution at this point.

5. Discussion

It is important to acknowledge that the international obligations pertaining to the
rights of victims of criminal offences and the associated right to effective investigation is
a breakthrough in the perpetrator–state relationship, which allows for a more extensive
interpretation of the term injured party so as to encompass an environmental organization
representing the interests of the public in relation to environmental protection. In fact,
this development is long overdue considering that the nature of environmental offences
by definition makes it impossible to identify a specific person as a victim in the narrow
sense. Furthermore, case law of the European Court of Human Rights suggests that the
right to effective investigation relates even to criminal offences which infringe upon the
right to private and family life [56], to offences where direct and serious assault on the life
of a person does not occur [58], and where the offence is committed by a legal person as
opposed to a public authority [57]. The right to effective investigation, therefore, can be
applied in general terms even to environmental criminal offences.

If the state has a somewhat monopoly on criminal law, which is an inevitable outcome
of the ‘no plaintiff–no judge’ element of environmental offences, a certain limit to public
power comes to life. At this stage, it should be underlined that public participation in
turn removes this limit by creating effective pressure on the law enforcement agencies
through including environmental NGOs in the criminal proceedings. Furthermore, it can
be expected that a similar development would likely have a positive effect on the behaviour
of legal persons who have so far been insufficiently compelled to respect environmental
standards. The deterrence effect among peers would actually act as a driver for increased
compliance among fellow businesses in this case [1,8].

Importantly, even though social norms encourage pro-environmental sustainable
behaviour capable of inducing significant positive changes as demonstrated for instance
by means of an empirical study by Farrow et al. [70], it is hardly enough in the case of
companies that are genuinely profit-driven, and which have repeatedly proved that norms
which only amount to soft law are insufficient driver for compliance. As a matter of fact,
even the law itself may sometimes be disregarded when economic interests are at stake [13].
As a consequence, there is a need to move from mere normative motivations towards
accepting the legally binding nature of existing instruments, and actually resort to legal
penalties. Once again, NGOs have proved their increasing role in holding companies accountable and bringing justice for environmental crimes [71,72].

As far as specific de lege ferenda proposals are concerned, at the national level, there could be an obligation on the part of the State to publish a list of ongoing environmental criminal proceedings to keep the interested parties informed about the content and development of specific proceedings; or a general obligation to provide information to environmental NGOs from the affected region through a website that would compile all relevant information about the ongoing cases. At the EU level, the adoption of a directive could be the most effective and yet fairly feasible solution forcing national legislators to acknowledge the right of environmental NGOs to participate in environmental criminal proceedings. In the context of the Czech Republic, an amendment of Section 43/1 of the Criminal Procedure Code comes to mind, adjusting the definition of the injured party in environmental criminal offences so as to include representatives of the public.

6. Conclusions

The case of the Czech Republic once again illustrates that there is a legal loophole in that the legislation does not provide for public participation in criminal environmental proceedings, which has wider implications for other Member States of the European Union, and by extension even on other signatory parties of the Aarhus Convention. The shift which has been outlined by the European Court of Human Rights, but which implicitly derives from international obligations and the rights of victims in general, should be recognized. In this regard, it is crucial to perceive the right to the environment as a human right and to consider the rights of NGOs in criminal proceedings as a manifestation of human rights due diligence. The respect for human rights relating to the environment has a major impact on the UN SDGs and represents a step forward to sustainable world, emphasizing that the current practice is neither sustainable, nor in the spirit of the UN Guiding Principles on the Environment or CSR. Essentially, while the positive development at different levels implies the will to embrace public engagement in criminal environmental matters, so far this shift remains largely on paper.

As underlined throughout the article, there is no doubt that the public participation in criminal proceedings, which contributes to its transparency, quality and consistency, will create effective pressure on the sustainability of corporate behaviour. Indeed, the involvement of environmental NGOs, their active role in bringing in evidence and the associated pressure on the relevant authorities to effectively investigate the case must logically lead to an increase in the number of successfully proven environmental offences. Thus, with every corporation that will be punished with a legal sanction, the number of corporations that will behave sustainably in the future will multiply—as a result of the deterrent effect, the possibility of media coverage by participating NGOs and environmentally sensitive CSR in the business environment. Achieving sustainable corporate behaviour, even if as a result of being sanctioned for a crime, or just conducting a thorough criminal investigation, or just out of fear of punishment that has befallen another corporation, is also in line with the generally perceived notion of CSR.

While the compelling nature of the present analysis should be acknowledged, it should be noted that its limits can be perceived in the assumed lack of empirical dimension. With regard to the chosen methodological approach, however, which surpassed social sciences and aimed to provide a legal science methodological approach instead, this is an understandable fact which can be compensated for by follow-up research. Namely, a case study based on empirical data could be conducted in order to demonstrate that criminal investigation of environmental offences is indeed ineffective in a way that could be resolved by increased public participation through the means of NGOs’ active involvement. From the legal point of view, the analysis has been carried out from the position of criminal law towards environmental law, which is an offshoot of administrative law in essence, and the opposite logic could, therefore, lead to different conclusions, especially as far as administrative procedure is concerned. At the same time, the paper is oriented towards
human rights considerations as a basis for specific procedural guarantees, which is not necessarily a standpoint another actor would derive. Notwithstanding these limitations, the entitlement of environmental NGOs to take an active role in criminal environmental proceedings remains a pertinent inference.

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