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КРИВИЧНО ДЕЛО УБИЈАЊЕ И МУЧЕЊЕ ЖИВОТИЊА – МАТЕРИЈАЛНИ И ПРОЦЕСНИ АСПЕКТ¹

Апстракт: Злостављање животиња третира се као кривично дело у Републици Србији од 1. јануара 2006, када је нови Кривични законик ступио на снагу. Тада је ново кривично дело, под називом убијање и мучење животиња, уведено у наше кривично право. У покушају да одржи корак са међународним стандардима у погледу добробити животиња, наш законодавац је усвојио и Закон о заштити и добробити животиња 2009. године, што је омогућило успостављање задовољавајућег нормативног оквира, посвећеног овом питању. Упркос овим иновативним законским одредбама, држава реакција на разне облике окрутности према животињама у Србији још увек је недовољно ефикасна, у односу на друге развијене земље, као што су чланице ЕУ или САД. У светлу наведених ставова, аутори анализирају облике кривичног дела убијање и мучење животиња, прописаног од стране нашег важећег кривичног законодавства. Поред тога, аутори указују на кључне проблеме, који се могу појавити у току кривичног поступка против починилаца овог кривичног дела. Аутори, такође нуде неке предлоге са циљем побољшања позитивноправних решења и њихове ефикасније примене у овој области кривичног права. Понуђене су, такође, смернице за јуриспруденцију, како би се процесуирање за кривично дело мучење и убијање животиња учинило делотворнијим.

Кључне речи: злостављање животиња, убијање и мучење животиња, добробит животиња, кривично дело, кривични поступак.

¹ Рад је настао као резултат рада на пројекту: „Заштита људских и мањинских права у европском правном простору“, бр. 179046 који финансира Министарство просвете и науке Републике Србије.

THE CRIME OF ANIMAL CRUELTY IN SERBIA – SUBSTANTIAL AND PROCEDURAL ASPECTS

Introduction

According to the information collected and published by the World Society for the Protection of Animals (WSPA), only 65 countries in the entire world have adopted national laws dealing with the protection animals². Due to long and rich tradition they have been maintaining in the field of animal welfare, the countries of common law system (such as Great Britain and the United States of America) and some developed European countries (such as Germany, Switzerland, Sweden and Norway) have a special place among them. The first legal provisions prescribing criminal prosecution for animal cruelty date from 1641, when «The Body of Liberties» of Massachusetts Bay Colony was declared. After that, legal sources dealing with this matter were adopted in 1828 in New York and in 1913 in Arizona.³ On the other hand, Great Britain is also known as the home of various animal welfare movements. Accordingly, one of the most significant organizations dedicated to the protection of animals – *The Royal Society for the Prevention of Cruelty to Animals (RSPCA)* was established in London in 1824⁴.

In the past couple of decades, European countries have been facing an actual «legal revolution» in the sphere of animal welfare protection. Nevertheless, such progressive tendencies do not represent solely the results of Member States' legislative activities performed on national level. They also come as the result of implementation of numerous relevant documents adopted within the auspices of the Council of Europe, various decisions of EU bodies and the standardization of European states' legislation⁵. Seven international conventions pertinent to animal welfare were inaugurated within the auspices of the Council of Europe between 1971 and 2006. European Convention

2 World Society for the Protection of Animals: An Overview of Animal Protection Legislation, 2006; available at: <http://enextranet.animalwelfareonline.org/resources/animalwelfare/legislation/index.aspx>

3 Ascione, F., Arkow, P.: Child Abuse, Domestic Violence and Animal Abuse- Linking the Circles of Compassion for Prevention and Intervention, Purdue Research Foundation, United States of America, 1999, p. 103.

4 The Royal Society for the Prevention of Cruelty to Animals Act, 1932 (22&23 Geo.5.), (Ch. XXXIX) , The Royal Society for the Prevention of Cruelty to Animals Act, 1940 (3&4 Geo.6.), (Ch. VIII) i The Royal Society for the Prevention of Cruelty to Animals Act ,1958 (6&7 Eliz.2), (Ch. XXIII)

5 Paunović, M.: Uporednopravni pregled zaštite prava i dobrobiti životinja, Strani pravni život, № 1/2004, Institut za uporedno pravo, Beograd, 2004. godine, p. 43.

for the Protection of Pet Animals, adopted in 1987 is considered as the most important of them since it proclaims minimal standards regarding possession, keeping and protection of house pets, particularly cats and dogs. European Community Treaty's Protocol on Protection and Welfare of Animals, adopted in 1997 and added to European Community Establishment Treaty, treats animals as living creatures with feelings, emphasizing that the Community and all its member states *shall pay full regard to the welfare requirements of animals*⁶. It is also worth mentioning that Europe represents the only region in the world that approached the issue of animal welfare through a series of international conventions.⁷

Criminal Legal Aspects of Animal Cruelty in the Republic of Serbia

Incriminating various aspects of animal cruelty, in the form of an environmental criminal offence, represents a radical and positive innovation in Serbian criminal law. Namely, criminal offence known as «Killing and Wanton Cruelty to Animals» was introduced into our legal system in 2006, when new Criminal Code of the Republic of Serbia came into force. Initially, this criminal offence was comprised of only two forms. The first one includes killing, injuring or torturing of an animal in violation of regulations⁸, whereas the second form of this criminal offence is committed if a number of animals or an animal belonging to a specially protected species is killed, tortured or injured⁹. After the amendments and alterations of the Code, which took place in 2009, more severe punishments were prescribed for this criminal offence and another, more serious, form was added to the aforementioned two. The third form of this criminal offence is related to the prohibition of animal fighting and other precisely enumerated illegal and harmful activities associated with that issue¹⁰.

6 Horgan, R.: EU Animal Welfare Legislation: Current Position and Future Perspectives, *Revista Electrónica de Veterinaria REDVET*, Vol. VII, No 12, Veterinaria Organización S.L., España, 2006, p. 2.

7 Paunović, M.: *Životinjska prava-prilog proširenoj teoriji ljudskih prava*, Strani pravni život, № 3/2005., Institut za uporedno pravo, Beograd, 2005, p. 34.

8 Paragraph 269, Subparagraph 1, Criminal Code, Official Gazette of the Republic of Serbia № 85/2005, 88/2005, 107/2005, 72/2009 and 111/2009

9 Paragraph 269, Subparagraph 2, Criminal Code, Official Gazette of the Republic of Serbia № 85/2005, 88/2005, 107/2005, 72/2009 and 111/2009

10 Paragraph 269, Subparagraph 3, Criminal Code, Official Gazette of the Republic of Serbia № 85/2005, 88/2005, 107/2005, 72/2009 and 111/2009

It has not yet been defined which social values are supposed to be protected by this criminal offence. In spite of being systematized within the chapter dedicated to criminal offences against environment, criminal offence of killing and wanton cruelty to animals only partially protects living environment¹¹. To be exact, the environment is damaged or injured if the second, more serious, form of this criminal offence is committed, because it includes killing, torture or injury of a larger number of animals or of an animal belonging to especially protected (and endangered) species. On the other hand, if only one animal (a dog or a cat, for example) is killed, tortured or injured, it would be inappropriate to claim that the commission of this criminal offence is directed towards the environment, as it has previously been defined.

The Code does not enumerate animal species that are subject to these legal provisions, which means that there are no explicit legal obstacles to provide protection for all animal species.¹² Such standpoint would be in accordance with fundamental ethical postulates of biocentrism and the principle of the equality of species.¹³ Moreover, identical legal protection of all animal species from animal cruelty is also proclaimed by two significant international documents: Universal Declaration of Animal Rights, adopted in 1978 and revised in 1989¹⁴, and Universal Declaration on Animal Welfare, adopted in 2000¹⁵. These documents suggest that all non – human mammals, birds, reptiles, amphibians, fish or invertebrates capable of feeling pain, suffering or stress are supposed to be protected by «anti – cruelty» legal provisions.¹⁶ However, the majority of contemporary legal systems, including Serbian as well, tend to accept the approach based upon the differentiation of species¹⁷ and, con-

11 In its 3rd Paragraph, Law on Environment Protection (Official Gazette of the Republic of Serbia № 135/2004) defines environment is as a group of natural and artificially created values whose complex relations form surroundings i.e. space and conditions appropriate for human life.

12 See: Paragraph 5. Point 13. Law on Animal Welfare (Official Gazette of the Republic of Serbia № 41/2009)

13 Paunović, M.: Životinjska prava-prilog proširenoj teoriji ljudskih prava, Strani pravni život, № 3/2005., Institut za uporedno pravo, Beograd, 2005, p.15.

14 Universal Declaration of Animal Rights, adopted by International League for Animal Rights in 1978, revised in 1989 and submitted to the Principle General of UNESCO in 1990

15 Provisional draft UDAW 2007-Universal Declaration on Animal Welfare (Recommendations for Ministerial Conference consideration) http://media.animalsmatter.org/media/resources/en/en_draft.pdf

16 Paragraph 1, Universal Declaration on Animal Welfare

17 Paunović, M.: Uporednopravni pregled zaštite prava i dobrobiti životinja, Strani pravni život, № 1/2004, Institut za uporedno pravo, Beograd, 2004., p. 28

sequently, provide legal protection exclusively for vertebrates (particularly domestic animals¹⁸, house pets¹⁹ and tamed and captivated wild animals²⁰). In view of that, it seems reasonable to limit criminal legal reaction solely to killing and torture of those animals that are able to feel injuries and harms²¹, i.e. pain, suffering, fear and stress.

The criminal offence of killing and wanton cruelty to animals can be committed solely by premeditation. Besides, the perpetrator has to be aware of the fact that his commission (behavior) represents the violation of relevant legal provisions.²² In attempt to keep up with relevant international standards pertinent to the issue of ecology, environmental protection and animal welfare, National Assembly of the Republic of Serbia adopted the Law on Animal Welfare²³ in 2009. As its title clearly says, this law is primarily dedicated to the protection of animal welfare as well as to the incrimination of diverse forms of animal cruelty through a series of misdemeanors i.e. administrative offences. The coexistence of two types of legal provisions regulating more or less the same issue, one of which belongs to the field of criminal law and the other to the sphere of administrative law, might cause certain doubts and discrepancies in judicial practice. Therefore, it is of essential importance to draw a clear distinction between those conducts that are considered as criminal offence against the environment (entitled as killing and wanton cruelty to animals) and the behaviors that constitute misdemeanors, i.e. administrative offence of minor significance. Distinguishing these two categories of illegal acts causes significant consequences that determine the type of procedure that is to be initiated and conducted against the perpetrator, court jurisdiction and the nature of punishment that is supposed to be imposed on him.

Criminal Procedural Legal aspect of Animal Cruelty

Criminal proceedings instituted for a crime of Killing and Wanton Cruelty of Animals is not different from normal procedure provided for the other offenses prescribed by the Criminal Code. But, since it is a criminal offense with maximum penalty of imprisonment up to 6 months (for basic

18 Tierschutzgesetz, Bundesgesetzblatt 7833-3, IS. 1277 iz 1972. godine

19 Videti: European Convention for the Protection of Pet Animals, usvojena od strane Saveta Evrope 1987. godine i stupila na snagu 01.05.1992. godine.

20 Videti, na primer: Texas penal code § 42.092. Cruelty to Non-livestock Animals

21 Lazarević, Lj.: Komentar Krivičnog zakonika Republike Srbije, Izdavačko-štamparsko preduzeće «Savremena administracija», Beograd, 2006, p. 695

22 Stojanović, Z.: Komentar krivičnog zakonika, Javno preduzeće« Službeni glasnik», Beograd, 2006, p. 615

23 Law on Animal Welfare, Official Gazette of the Republic of Serbia № 41/2009

form), ie, up to 3 years (for qualified form), pursuant to Article 433. of Criminal Procedure Code²⁴, short (summary) trial shall be kept. This implies that the time from the initiation of the proceedings to the Court decision should not be too long, since the summary criminal proceedings characterizes by its simplicity and urgency, with absenteeism or short duration of some phase of the regular order of proceedings.

Of particular importance for illuminating and the solution of this offence is the efficient police operation in the pre- trial proceedings. It is necessary to takewell- timed investigative actions, especially if there are indications of abuse of animals in an extended duration, or organizing dog fights. Timely intervention they can catch the perpetrators *in flagranti*, in which case the police can obtain a large amount of evidence in the site of the offence²⁵. Also, in the case of other forms of execution of this offence (murder or injury of animals), well- timed action it essential, especially crime scene investigation with the presence of experts who can thoroughly collect clues and determine the resulting injuries to the body of animal-wictim²⁶.

Criminal proceedings in cases of wantom and killing of animals, initiates by indictment of the public prosecutor or by the private charge (Article 434 CPC). There is a significant opportunity given to the public prosecutor to file an indictment based on the criminal charges. At this stage, the most important is awareness of the need to report of the animal abuse, which may be affected by advocacy and by illumination of the problem of the animal abuse through the media. In this field in recent years in Serbia a lot of things have been done, as the media devoted considerably more attention to the occurrence of animal abuse, in addition to increasing the representation of animal protection societies and NGOs involved in combating of this negative social phenomenon. The result is a growing number of complaints²⁷ that the owners of animal-victims, but other citizens are submitted to the police, and

24 "Official Gazette of SRJ", nr. 70/2001 i 68/2002 i "Official Gazette of Serbia", nr. 58/2004, 85/2005, 115/2005, 85/2005 – other Law, 49/2007, 20/2009 – other Law i 72/2009.

25 See: Newspaper news of clearing up the crime of torture and killing of animals in Jagodina. Text available at: <http://www.rts.rs/page/stories/sr/story/135/Hronika/791614/Nova+hap%C5%A1enje+the+fight+pasa.html>

26 Glorious example of the police activities was observed in case of poisoning a dog in Paracin. In fact, police in the morning when they received the order of the investigating judge searched the suspect's apartment, where they found traces of poison in the hands of the defendant and in a dog-hair-sacrifice, which was later confirmed by toxicological analysis. Taken from: http://orca.rs/vesti/2011/03/23/prva-presuda-za-trovanje-zivotinja_-model-nadleznima.html

27 According to the data of NGO "ORCA", from 2006. to the beginning of 2011. over 5000 cases of poisoning dogs have been reported.

increasing number of complaints about abuse of animals submitted to the relevant NGO organizations. The improvement of cooperation between NGOs and the police and public prosecution is the fact that in 2008. and 2009. more than 30 reported cases have been proceeded²⁸.

During the trial in the case of perpetration of killing and wanton cruelty of animals offence is almost inevitable need to carry out of expertise. To the prove of the body injury inflicted to animals, it is necessary to determine the experts of the veterinary profession. Its findings and opinion is often the key evidence that the injuries on the body of animals is result of the human action, as in the previous case law noted that the defendants defended with non-recognition of harm to an animal, or that the injuries inflicted in the defense against attacks by the animal. It is often necessary to perform a physical examination of the defendant in criminal proceedings, in order to determine the facts just mentioned. In more complicated cases where the cause of death of the animal is dubious, it is possible to perform an autopsy, where such a finding could be crucial in the process.

The most specificity of the criminal proceedings for abuse of the animals is that the victim of criminal activities (animal) is lack of the the ability to testify about the attack on its life and physical integrity. In this situation, the role of the eyewitnesses, or so-called witness by reputation is emphasized, who have an information about the perpetration of the offence, about the perpetrator (his personal traits) and, especially, about the relationship with the owner of the animal-victim, as it often happens that the animals are collateral damage in retaliation to their owners due to troubled relations with the perpetrator of the offence. In this regard, it is worth hearing of the owner of animal-victim as a witness. In the case where a judge has a knowledge of the strained relations of the defendant and the owner of the animal-victim, it is useful to and use of confrontation of the defendant and the owner, but we should not forget also the use of polygraph testing of the defendant, under the conditions prescribed by the law.

Very little or no attention in the previous case law profile has been given to the psychological profile of the accused for abusing of animals. Psychological science has found that the violence against animals often represents only a first step, a pre-phase of the violence against people²⁹. Most often the

28 See: Report on the work of ORCA (Organization for Respect and Care of Animals) for 2008. and 2009. year. Text available at: <http://orca.rs/cms/uploaded/PDFovi/Izvestaj%20of%20of%20ORCA%202008%20and%202009.pdf>.

29 This is indicated by examples from practice that the son of a dog abused by his father in order to malice to him, and after a few months he killed his father. Source: <http://www.politika.rs/rubrike/Hronika/Mucene-zivotinje-ne-mogu-da-svedoce.lt.html>

perpetrators of these crimes are persons with psychopathic or schizoid personality structure. Also, there is a correlation between domestic violence to whom the perpetrator (potential abuser of animals) has been exposed in his childhood, and later execution of the killing and torturing animals offence. In addition, offender's mental disorder also indicates the way of committing this crime. They have been observed such a cases with cutting off limbs of animals, hanging, burning, decapitation, feeding the nails, causing numerous physical injuries that lead to slow and painful death of animals, even cases of animal rapes. It is, therefore, necessary to determine the defendant's mental health expertize, and in the required cases to impose an appropriate medical security measure of compulsory psychiatric treatment and confinement (in a medical institution or at large).

In terms of sentencing for the crime, the practice of the courts in Serbia indicates on the dominant imposing of the fine³⁰ and probation³¹, rare on imposing of the unconditional prison penalty³². Since it is for carrying out of the basic form of killing and wantom cruelty of animals offence prescribed the fine or imprisonment for up to 6 months, and for the qualified form³³ of a maximum imprisonment of 3 years, it can be concluded that in the practice the courts imposed lenient sentences. This is a message to the animal abusers that in the case of committing this crime they probably will not end up in a jail. There were no cases of imposing of the medical security measures in practice, which indicates to a total disregard of the fact that the perpetrators of these crimes are often people with mental disorder where there is a risk that they can execute the same offense again, or an offense with elements of violence against people.

30 The monetary penalty for murder and hanging of cat, for killing a dog by throwing into the river fine of 50 000 dinars (about 500 e), the murder by poisoning a dog fine of 70 000 dinars (about 700 e).

31 Probation in duration of 8 months for killing a dog causing numerous injuries and a brick vault, probation of 3 years for killing a dog who was tied to the hook pulled convicted car while he died, a probation of eight months for killing a dog causing more injuries biting with agricultural tool.

32 Co-perpetrators of torture of the bears were sentenced on two months imprisonment; For the cold-blooded murder of a dog shot from a gun offender is sentenced to imprisonment for 3 months.

33 The killing of more animals or protected animals (Article 269, paragraph 2 of the Criminal Code).

Conclusion

The adoption of the abovementioned legal provisions provided the establishment of an adequate normative framework for the protection of animal welfare in our country. However, it remains uncertain whether all actual circumstances allow all of the principles proclaimed by these legal sources to be accurately applied by the representatives of judicial and administrative authorities. In spite of the abovementioned positive tendencies and innovations in Serbian criminal legislation, available official statistics confirm that the number of persons reported to have committed the crime of animal cruelty has been gradually increasing in the past four years.³⁴ At first glance, such parameters might indicate that there has been a dramatic increase in the amount of animal cruelty in our country. This would not appear as impossible since numerous developed and developing countries have been facing an actual escalation of all sorts of violent criminal offences in the past couple of decades, particularly in the field of juvenile delinquency³⁵. However, it seems to be more likely that the number of criminal offences comprised of killing and torture of animals has remained more or less at the same level. What has undergone some thorough changes is state's reaction to this type of violent and socially hazardous criminal behavior as well as the awareness and the sensitivity of state bodies and officials, legal and other experts, the media and individuals to the issue of animal welfare and environment protection.

Regardless of positive legislative tendencies on one hand, and disturbing violent crime rate on the other, the punishments imposed on the perpetrators of this criminal offence still seem to be rather mild in comparison to the maximum prescribed by the law.³⁶ Such penal policy is not completely

34 Statistical Bulletin «Adult Perpetrators – Reports, Accusations and Judgments (2007)», № 502, Office for Statistics of the Republic of Serbia, Belgrade, 2009; Announcement «Adult Perpetrators (2004-2008)», № 137, Office for Statistics of the Republic of Serbia, Belgrade, 2009 and Announcement «Adult Perpetrators (2005-2009)», № 194, Office for Statistics of the Republic of Serbia, Belgrade, 2010

35 Howell, J. 2003. Preventing and Reducing Juvenile delinquency: A Comprehensive Framework, United States: SAGE Publications p. 3.; see also: Ignjatović, Đ. 2009. Fenomenologija i etiologija kriminaliteta maloletnika, u: Revija za kriminologiju i krivično pravo, Vol. 47. № 1. Beograd: Institut za kriminološka i sociološka istraživanja, p. 5.

36 See: Statistical Bulletin «Adult Perpetrators – Reports, Accusations and Judgments (2007)», № 502, Office for Statistics of the Republic of Serbia, Belgrade, 2009; Announcement «Adult Perpetrators (2004-2008)», № 137, Office for Statistics of the Republic of Serbia, Belgrade, 2009 and Announcement «Adult Perpetrators (2005-2009)», № 194, Office for Statistics of the Republic of Serbia, Belgrade, 2010

appropriate since the consequences of animal cruelty do not affect solely the issue of animal welfare but some other equally or even more significant social values. Psychological studies highlight the correlation between animal cruelty and violent behavior against humans³⁷ particularly including domestic violence and child abuse³⁸. Some authors even consider animal cruelty, as well as setting fire for example, as a behavioral factor that belongs to the so – called «homicidal triad» and represents a certain predictor of individual's violent criminal behavior³⁹. In view of that, the prevention and the suppression of animal cruelty (either by criminal or by administrative sentences) can also be perceived as one of the instruments for the prevention of violence and violent criminality in general.

In order to effectively combating of the problem of animal abuse, it is necessary to improve a criminal regulation of Serbia. First of all, the classification of the crime in the group of crimes against the environment is unacceptable. The animals are sentient beings who are often very committed to people, and the killing and torture of them affects basic human feelings of their owners. Therefore, this offense is closer to the group of crimes against basic human rights, because the abuse of animals causes a mental pain for their owner. We also consider that the penalty for a basic form of of this crime are insufficient, and that is necessary to tighten the penal policy, in terms of increasing the special maximum of the penalty to one-year prison sentence (for the basic form of the offence) and to 5 years (for qualified forms). In addition to the existing qualified form of the offence, it is necessary to predict the other; for example- sanctioning of organized killing and torturing animals, then animal abuse committed by members of the relevant associations (mostly associations of hunters), or by services whose duty is an animal health (veterinary services). As one of the potential qualified forms, imposes the killing of animals in a cruel way or a insidious way, then killing of animals out of revenge or other base motives. Severe punishment for the killing of animals in order to gain material benefits is, also necessary. Finally, perhaps a separate offense which incriminate the organization, funding, participation and betting on animal fights is needed, due to the particular dangers of this form of the human behavior.

37 Striving, H.: Animal Law and Animal Rights on the Move in Sweden, Animal Law Review at Lewis and Clark Law School, Vol. 8., No 93, Portland, Oregon, 2002, p. 95

38 Ascione, F., Arkow, P.: Child Abuse, Domestic Violence and Animal Abuse- Linking the Circles of Compassion for Prevention and Intervention, Purdue Research Foundation, United States of America, 1999, p.51.

39 Hellman, D., Blackman, N.: Enuresis, Fire Setting and Cruelty to Animals: a Triad Predictive of Audt Crime, 122 American Journal of Psychiatry, 1966, pp. 1431-1435

In accordance with current legislation, it is necessary to tighten so far a practice of imposing of lenient sentences in the criminal proceedings. If the perpetrator of this crime at the time of the crime execution was mentally capable, it is necessary to operate a sentence of imprisonment, not probation or a fine, which would affirm the special purpose, and particularly the general purpose. In contrast, in the case when the perpetrator was insane, it is necessary to impose the medical safety measures. When, however, the perpetrator of this crime was juvenile, in particular, younger juveniles, it is necessary to react with the imposition of an adequate corrective measures. However, we believe that is crucial the imposition of the specific obligation for a minor side by side with an educational measure, in the form of the participation in the activities of humanitarian organizations, specifically organizations that care about animal welfare, in order to affect to the future behavior of animals by education.