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POACHERS IN THE NET

Illegal Fishing and the Criminal Law

By virtue of the geographical and ethnographical characteristics of Hungary, precise codification of the regulations regarding fish farming is highly desirable which encompasses rules at the fields of both administrative and criminal law. Hungary, based on its small relative geographical area in Europe, is uniquely abundant in freshwater lakes, as well as in rivers, tributaries, and smaller streams, in relation to which it is necessary to set apart the regulatory frameworks regarding sport angling, recreational (hobby) angling, and fishing. For the aforementioned activities, only administrative regulations are required primarily, any violation of the laws in the course of practicing them, however, is a subject of the laws of infractions and criminal law. The *Act CII of 2013 on Fish Farming and the Conservation of Fish* (henceforth referred to as: Act) as well as the *Decree 133 of 2013 of the Minister of Agriculture on the Specification of Regulations on Fish Farming and Conservation of Fish* (henceforth referred to as: Decree) contain the statutory background of administrative regulations for this subject.
The Act draws a basic distinction between the concepts of fish farming and fish catching where the former one is defined as activities related to the conservation, regeneration, and exploitation of fish stocks in natural water bodies, as well as the generic concept of aquaculture and other fish farming activities whereas the latter one is defined as catching, and not releasing back into the water, fish or other useful aquatic animal in the course of fishing or angling. In my essay, exclusively those possible legal responses will be considered which may be given to violations of the laws related to catching.

Key words: illegal methods of catching fish, principles European law, territorial closure, fishery management, new Hungarian Criminal Code

INTRODUCTION

Before all, it is reasonable to clarify that the two predominant methods of catching fish are angling and net fishing, or simply fishing. Fishing regularly aims at catching animals in larger quantities since

its function is first of all the fulfillment of specific economical needs. Angling, in contrast, can be understood basically as a recreational, sport, or hobby activity. The angler, as a general rule, is allowed to angle with a maximum of two fishing rods (with 3 hooks per rod) at one time. The angling methods taking shape during the evolution of angling show a diverse picture: float fishing, bottom fishing, spin fishing, fly fishing, downrigging, trolling, or clonking for catfish catch (HÁGER 2006: 32).

The wording of the Act itself refers to such a distinction according to which angling is catching fish for recreational purpose by means and tool for angling, allowed by this act and by the decree implementing this act, in fish farming waters, or catching bait fish by lift net not exceeding 1 square meter /Act Section 2(16)/; fishing, on the other hand, is selective catching or collecting fish or other useful aquatic animal by allowed means and tool in fish farming waters for recreational or commercial, as well as ecological purpose, except angling / Act Section 2(9)/.

For the analysis of the subject, the examination of the following topics is necessary; 1) The criminology of illegal fishing; 2) Sketching the regulatory background; 3) Considering the aspects of the delimitation of offenses requiring interventions by either the administrative or criminal law; 4) The theoretic solutions, and possible shortcomings, in the recent regulations of criminal law.

In my essay, of course, ethical issues are dealt with too. Even the question can be raised about animals in general whether to have moral standing, deserving protection by the regulations of criminal law too, and about different animal species whether to fall under the same category or not in this regard, (i.e. the differences in pain sensitivity and sensory thresholds can be substantial, etc.). "These questions, and the answers given to them, deeply divide people who work in animal protection. Some activists assert that every animal is equal, according to the representatives of the other viewpoint, it is not possible to give an affirmative answer to this question" (JÁMBOR 2016: 18).

HISTORIC OVERVIEW. ILLEGAL FISHING IN THE CRIMINOLOGICAL APPROACH.

Since the times of Stephen I, first king of Hungary, there had been historical records in relation to the regulations of fishing rights. In the

beginning, these regulations were restricted to the definition of the entitled parties (dioceses, barons, and other aristocratic classes). The legal documents of the Middle Ages speak of a highly developed fish farming economy, and fishery had become a professional occupation in those times. It reserved, of course, its monopolistic status though because this activity was still considered to be a royal prerogative, so called *jus regale*. The relations in regards to the rights of property and use were regulated in acts on the one hand, and by means of consuetude on the other. In the landlord-serf relation, the so called *urbarium* or a particular contract settled down how much fish, and rent, the fisherman was expected to provide, and pay, in return for the fishing allowance.

The ecological and societal changes from the 19 century necessitated the reorganization of the regulatory framework. By the abolishment of serfdom the acquisition of fishing rights became merely a matter of wealth, and by the same token, the number of the natural waters, and the fish stock, diminished substantially. The *Act VI of 1836*, however, retained the regulation of fishing as a royal prerogative invariably, and continued to ban the serfs from this activity. The *Urbarium Patent* of 1853 too upheld the view according to which the reorganization of urbarial relations did not apply to the so called *jura regalia*.

From the years of the 1870s onwards, a ministerial level, decree type legislation started. In the course of this legislation different seasonal closures were introduced, and specific fishing methods, (e.g., use of poison or dynamite), were prohibited.

The first legislations in this field were the *Act XXVIII of 1885* (Water Act), the *Act XIX of 1888* (Fisheries Act), and later the *Act LXIII of 1925* and the *Decree 9500 of 1926* on the implementation of the latter. These legislations declared that "the bed and banks of the bodies of water are the properties of the coastal possessor, and fishing is an indispensable part of the coastal possession" (BEZDÁN 2005: 5). The declaration of this modern position of the proprietor was at the same time accompanied by obligations for the proprietor to provide the necessary and reasonable services in relation to fisheries management (i.e., establishing fisheries societies, supplying the markets, etc.).

From the end of communism in Hungary, the methods of, and the frequency characterizing, illegal fishing have changed substantially. The two major changes can be identified in the characteristics of the tools used for, and in the ever growing recurrence of the organized character of, the commitment. All these were paired up with such,

before all climate related, ecological impacts that necessitated new solutions in the treatment of illegal fishing and angling (henceforth referred to as: fish poaching), as well as the extension, and the increase of the efficiency, of the control exercised by the authorities.

The *Act XLI of 1997 on Fishing and Angling*, enacted in the year of 1997, already before its commencement, has received many critical acclaims: "the new legislation in its original formulation before its enactment has not served well a sustainable fish economy anymore that should otherwise take into account the aspects of environmental protection, and the societal and economic priorities of Hungary. Such kind of legislation, and a regulatory framework based on it, became necessary which, besides the particular modes of use, supports the natural regeneration of fish stock and prevents illegal catching and trading of fish" (HÁGER 2006: 32).

Also it became a fundamental question whether it would be necessary to rethink the techniques of sanctioning these violations of laws. That kind of common sense argument, however, went against the efforts for the criminalization which looks at the violations of laws related to fishing simply as 'mischief,' tolerable hobbies, and at fish as 'res nullius.' Even so, with effect from 1 July 2013, the poaching of fish became a separate criminal category in the new *Criminal Code* (Act C of 2012).

Behind the intention of the legislator the following aspects 'lurked;' 1) Besides the 'lone,' occasional offender, (who acted in a 'shoot and run' manner), groups also showed up working with professional equipment, operating in organized form, striving for regular profit; 2) Poaching, since the 90s, has become a status symbol in certain circles in the course of which catches were often carried out in seasonal closures, and of protected species; 3) The different water areas (e.g., the biggest lakes in Hungary, like *Lake Balaton* or *Lake Velence*, or the backwaters of the *Danube*) were principally out of control, and the by that time existing institutional mechanisms of the control exercised by the authorities could be characterized well as meager; 4) By joining the EU, the danger of the widening scope of criminal circles and methods emerged; 5) Also the food security hazards of large-scale illegal fishing surfaced since before handing forward the catch the offenders did not necessarily store the fish in a professional manner, and care about the requirements of hygiene, etc.; 6) By the illegal activities the complete ecosystem was affected, including protected fish species too, etc. (ELEK 2009: 10).

In our times either, of course, the offenders are not looked at by the public opinion as 'definitely antisocial, unscrupulous perpetrators' which is partly due to the fact that many motivations of these illegal conducts can be pinpointed, like the 'beauty of nature walks,' the ecstatic experience of the catch, the guise of a sport activity, financial difficulties, etc. On the other hand, as it is my conviction, the offenders themselves either are not aware of committing a crime, or of the possible ecologic impact of their conduct.

In the essay of Balázs Elek, an interesting argument can be read according to which "beyond the violations of material, property related interests, before all the creation of dangerous situations has to be mentioned. Since poaching regularly produces dangerous situations in various areas of the country. It can often be heard that fish guards, rural guards, even policemen try to keep off such areas where poachers are active because they lose courage. The poacher can be dangerous also therefore because in fear of discovery, punishment the poacher can exert aggression against that person who catches or debunks the perpetrator […] there is a close link between poaching and accidents too since this conduct carried out secretly, by violation of professional rules, often leads to an accident. There was example for it that a man was caught in his own illegally thrown net in one of the backwaters of the *Tisza*. There was no escape from the dragnet, traditionally used in Hungary, now banned; it was in vain for the poaching fisherman to try to cut himself out of captivity (ELEK 2009: 10).

According to my opinion, using penal measures in response to the violations of laws is important primarily from the point of view of nature and environmental protection. The regeneration of fish stock is a slow process, stretching many times over several years. This has, of course, economical impacts too as Kőhalmy notes; the goal of fishery management is "to get permanent yields without risking the future existence of the source. In case of renewable sources when we try to estimate their value not only their actual value, expressed in money-price, has to be taken into account but also the indirect damages, caused by their degradation, (the loss in diversity of the ecosystem), or the costs caused by the restoration of them when already degraded" (KŐHALMY 1994: 71). According to Elek, the value of the killed fish extends beyond that value which would be otherwise the guiding standard in court (based on expert opinion) in the case of a simple theft (ELEK 2009: 10).

According to Háger "the protection of fish […] is an eminent task in environmental protection since the role of human activity in main-

taining fish stock is unavoidable. Because of the earlier river engineering practices, as well as the impairment of the general condition of the environment, the fish stock in free waters, left alone, is not capable for renewal anymore" (HÁGER 2006: 29).

STATUTORY BACKGROUND, PRINCIPLES OF INTERNATIONAL LAW

The statutory background applicable to illegal fishing is complex and it is, thus, related to many branches of law. Before all, however, it is important to place emphasis on those general legal principles according to nature and environmental protection set forth by international and European Union law which have to be unconditionally effective also in the sovereign national legislation.

As a general rule of international law, the non derogation principle should be emphasized which declares that the already existing level of protection achieved by earlier legislation can never be lessened because it can lead to irremediable environmental damages, as well as to the deterioration of the already existing condition. There is only possibility for 'withdrawal' if it turns out to be indispensable for the implementation of a specific constitutional value (FODOR 2014: 109–110).

At the level of the European law, the *2003/80/JHA Council Framework Decision* has to be emphasized the *Article 2* of which declares that each member state shall establish specific conducts causing harm to the environment as criminal offenses. Among others, unlawful possession, taking, damaging, killing, etc., of wild fauna or flora species have to be considered as such. This attitude of legislation has to prevail especially in those habitats where the aforementioned species is threatened by extinction. Furthermore, it is important to refer to the *2008/99/EC Directive of the European Union on the Protection of the Environment through Criminal Law* (POLT 2003: 9–14).

In relation to the *Fundamental Law of Hungary*, the country's constitution, the *Article P* has to be stressed which declares the principle, and requirement, of 'sustainability,' as well as the circle of individuals to whom it is addressed; according to this not only the state but each person is obligated to maintain the integrity of the environment, as well as to prevent the deterioration of the good condition of the environment. The aforementioned Act can be characterized as the 'base law' of the topic which, among the general provisions, declares that

the fish stock in the fishing management waters of Hungary is national treasure, natural asset, and economical resource which shall be protected by the society, and the renewal of which shall be aided, and the exploitation of which shall be planned and carried out, only according to the requirements of sustainability (Section 3).

Other relevant acts of protective value; a) *Act LIII of 1995 on Environmental Protection* which, among others, declares the protection of water, as well as of life; b*) Act LIII of 1996 on the Protection of Nature* which delivers detailed content to the general provisions of other branches of law, especially those of criminal law; c) The *Act XXVIII of 1998 on the Protection of Fauna*, as well as the *Act LV of 1996 on Hunting*, partly deals with issues of the littoral ecology of waters too; d) the *Decree 13 of 2011 of the Minister of Environmental Protection*.

APPROACHES IN ADMINISTRATIVE LAW AND THE LAWS ABOUT CIVIL INFRACTIONS

According to the *Act II of 2012 on Civil Infractions, Civil Infractions Proceedings, and the Registry System of Civil Infractions* (henceforth referred to as: Infractions Code), the primary person of authority for controlling infractions is the fish guard who, according to this regulation, has an authority extending to charge on-the-spot fines (Infraction Code, Section 39.). It is a further requirement for this authority that he or she shall be an employee of any public administration body, or a governmental official of local government, or a public employee, or an official of the central government, or an official employed by the state.

The Infraction Code, a bit scantily, does not refer to such as 'fish poaching,' or to any conducts similar, or related, to these violations of law. Only in relation to breaching hunting, fishing, or grazing prohibition (*Section 215*), the Infraction Code makes a reference to it that breaching the general hunting, fishing, or gazing prohibition ordered in relation to the protection against natural disasters constitutes a civil infraction.

In addition, that subtype of the infraction against nature protection can be brought into relation with violations of the laws related to fishery management in the course of which the offender causes damage to, or takes, or kill, the living specimen of the protected spices, as well as when he or she disturbs the specimen of a protected or highly protected species in its habitat to a substantial extent.

The fine ranges between 10.000 and 500.000 forints /Infraction Code, Section 67(3)/. Its exact amount shall be specified based on all circumstances of the case, especially the scope, severity of the infringed interests of the affected individuals, the length of the period of the infringement of rights, and repeated commitment of the conduct, the advantage achieved by the infringement of rights /Infraction Code, Section 68(1)/. If the imposition even of the minimal amount of the fine is unnecessary for terminating the unlawful condition, or preventing from the further infringements of rights, the fishery management authority might give a caution to the person involved in the proceeding (Infraction Code, Section 70).

The coordinating body for the authority tasks analyzed so far has been the *National Fish Guard Service* since May 1, 2015 which is constituted of the fish guards employed, or delegated, by the *National Food Chain Safety Office* (henceforth referred to as: NFCSO). The national fish guards have jurisdiction for the entire country therefore, compared to the fish guards employed by authorized persons for fishing, they are entitled to act in any fishery management waters of Hungary and, in regards to the Infraction Code, are considered as fish guards. Personally I think, in respect to the prevention, and retribution, related to illegal catching of fish, this centralization of the control exercised by the authorities to be reasonable by all means.

Under the Act, the said authorized person is entitled, among others, to a) restrict, or prohibit, manufacturing, storing, shipping, using, trading, exporting, importing, or, in the area of his or her jurisdiction, transporting fish product, b) order the fish stock or fish product to be seized, withdrawn from trade, recalled, made harmless, destroyed, c) seize, forfeiture, order, at the expenses of the owner, the destruction of, the equipment appropriate for catching fish, d) impose fishery management fine on the person authorized for fishery management if he or she issues territory ticket for a person without national angling ticket, national tourist angling ticket, national fishing ticket, etc.

Besides these, this authorized person is entitled to impose fish protection fine on the person angling or fishing unlawfully; failing to keep catch notebook; angling or fishing in a way, with an equipment, not allowed by the Act or in seasonal closure; accomplishing the catch (collection) of prohibited fish or other useful aquatic animal; carrying out fishing or angling activity disturbing the reproduction and development of fish in a recreational closure area until the revocation of prohibition; trading fish or fish product of uncertified origin; emitting

into the fishery management water any organism, food, pollutant appropriate for perturbing the natural equilibrium existing in the habitat of fish; accomplishing the unlawful catch of fish or other useful aquatic animal protected by size or bag limits, or seasonal closure, etc. (Act, Section 67.)

CASES FALLING UNDER THE CRIMINAL LAW

The present Criminal Code, in contrast to the former one, the Act IV of 1978, defines fish poaching as a *per se* crime, separately from the definition of cruelty to animals. According to Belegi, the reason for this might be that the common sense understanding, and the commitment of the conduct, of fish poaching does not fit into the conception of cruelty to animals (BELEGI 2013: 1066). The motive of fish poaching, as the reasoning goes, basically is not to torture, cause any suffering to, the animal but to catch fish. Purely on theoretical grounds, I cannot agree with this argument since, according to this, not the trivial meaning or the conduct itself but the purpose differentiates between the conducts of the perpetrators. Notwithstanding I do not think the widespread judicial practice to be proper either based on which fish poaching and cruelty to animals cannot be charged in multiple count indictments.

The object of crime is 'fish' which is, according to the Act, any animal belonging to the groups of fishes and *Cyclostomes*, jawless fishes, in all phases of their ontogeny. /Act, Section 2(5)/

In most cases, the motive of the perpetrator is to catch native fish species in the given water area, (e.g., carp, zander, catfish, pike, eel, asp, barbel, etc.), but, of course, also in the case of fishes of nonnative origin, (e.g., silver and bighead carp, grass carp), as well as of native but smaller fish species, (rudd, crucian carp, tench), the conduct falls under the definition of this crime. Furthermore, objects of crime are aquatic animals defined as 'useful' by the law too, thus, frogs, crustaceans, mussels, leech, sludge warm, lake fly, and other fish food organisms, in all phases of their ontogeny (HÁGER 2006: 34).

According to *Section 246(a)* of the Criminal Code, the perpetrator of the misdemeanor of fish poaching is the person who is engaged in activities for catching fish without authorization. This phrase of the section can be applied only to that case if the perpetrator uses fish net or other fishing tool during his or her activity. Illegal angling alone, however, is not a crime in itself.

According to the categorization by Szilágyi, different methods of fishing have been developed in line with the behavior of the game animals. Using fish net can be considered to be the most frequent method which can be divided into the two subcategories of (active) trawl and (passive) static methods. The net, according to its type, can be lift, push, bottom trawling, as well as dragnet. Furthermore, catching fish by hands, the noodling, or using some *ad hoc* tool, (e.g., basket), fall also under the category of fishing (SZILÁGYI 1980: 34).

The subject of paragraph *(a)* can be only that person who does not possess license required for any activity for catching fish. In this regard I would like to refer to the regulation according to which the fish stock living in the fishery management waters of Hungary, as a general rule, is state property. To catch fish that person is entitled who is personally authorized for fishery management in the waters of fishery management, or who possess license for catching fish issued by this person. /Act, Section 6 (1)-(2)/

The person with fishing right is, therefore, the owner on the one hand, and the usufructuary on the other. The Act also gives a closed enumeration of the persons entitled to usufruct according to which, in the waters for fishery management, activities for catching fish can be carried out either with 1) fishing license, or 2) national fishing ticket, in case of selective fishing for commercial and ecological, or recreational purpose, respectively, or with 3) national angling ticket, or national tourist angling ticket, in case of angling. It is important to note that the person with fishing management right is entitled to give further rights for fishing or angling to the authorized person by issuing territorial ticket. /Act, Section 44 (1)/

The person with fishing management right is obligated, among others, to display the name (company name), address (registered office) by whom the ticket has been issued, the name of the licensee, the fishing management water the ticket is valid for, as well as the period of validity of the territorial ticket too. (Decree, Section 27.)

The national fishing ticket is issued by the national fishing management authority and is valid from the date of its issue until January 31 of the next year. The national fishing ticket endows the ticket holder with the right of using simultaneously only 1, maximum 16 m^2 size, active fishing tool and 3, maximum 2 meters diameter, fyke net. The national fisher certificate, requirement for holding state fishing ticket, can be obtained by the successful completion of the subject-to-fee course organized by the fishing management authority. (Decree, Section 18.)

The act in paragraph *(a)* can be committed with either direct or oblique intent. There is no obstacle in the way of the determination of complicity if more persons carry out illegal fishing with knowledge about each other's activities, jointly, and in an active way. Evaluating the activity of a person for abetting, i.e., psychical help, who is merely present and passive, is, in my view, unreasonable, and besides this it can run into difficulties when it is about presenting evidence; by the same time, however, securing the necessary material substrates, (e.g., fish net), in advance or simultaneously makes aiding, i.e., physical help, always demonstrable. In regards to the stages of accomplishing the act in paragraph *(a)*, purchasing the necessary tools for fishing is preparation, taking the fishing tools to the bank is attempt, and letting the tools in the water is accomplished crime.

The poaching of fish as defined in *Section 246(b)* can be committed by any person who is engaged in activities for catching fish using unauthorized fishing equipment and/or methods, provided for in specific other legislation, or in restricted fishing areas. In a case in Hungary, the defendant wanted to catch fish by raking on the bottom with a prohibited, destructive technique but after the second attempt was caught in the act by fish guards. The court, relying on Section 246(b) of the Criminal Code, sentenced the perpetrator as recidivist to 30 days in prison (Judgment 4.B.602/2013/5 of the District Court of Esztergom, in HÁGER 2006: 37).

The perpetrator of this crime, thus, in contrasts to paragraph *(a)*, can be a person also in possession of a license to carry out any activity in favor of catching fish. By the same token, I would like to note that, because of being an act more seriously harmful to society, as well as the wider scope of the potential perpetrators, I would feel necessary to define this phrase as a felony and at the same time to lift the maximum penalty to 3 years in prison.

In regards to the prohibited tools, as well as methods, the closed definition provided by the Decree gives orientation – the function of which relies on the physiological effect of electricity on fishes; the poisonous and/or stunning materials; explosives; stitching tools; the diving spear and other diving tools appropriate for catching fish; raking; using poacher's noose; practicing the method of dropper loop or single line-hook fishing for bottom fishing; gillnets; as well as attempting any of these activities. /Act, Section 46 (4)/

In course of raking the perpetrator lets the hook enter into a body part of the fish other than its mouth. This requires special equipment:

"regularly a very strong, (3-4 m) long […], hard rod, a bigger spinning reel, as well as a strong, thicker than average line is needed. The terminal tackle for raking is a bigger sinker, as well as more triple hooks. The triple hook can be tied to a leader attached to the mainline, or fixed tightly to the sinker, often by molting it to the sinker, this way linking the parts of the tackle together. A fisherman, and especially the fish guard, or a policeman with knowledge about angling, instantaneously recognizes the prohibited tool, as well as the special movements required for exercising this method. Raking is practiced in flowing waters, backwaters, and lakes as well, in both summer and winter. The fisherman casts the line into the water, then, with a characteristic, tugging movement […], draws the final tackle back. Raking is aimed at catching fish types with greater body size, in the spring/summer usually inhabiting the upper part of the water column, like the silver and bighead carp, the grass carp, specimens of carp schools. In winter, raking the more valuable, bigger catfish from the bottom of the water is more typical. Because huddling together, laying down in groups, especially in winter, during winter rest, is a behavioral trait of this species" (SZÉKELY 1980: 15).

The territorial closure serves as a water area for the calm, damage and disturbance free winter rest, and reproduction of the fish which is appointed by the fishery management authority. (Decree, Section 4.)

According to the Decree, the person authorized for fishery management is obligated to make the regulations in regards to the prohibitions and restrictions applicable to territorial closures public. The person authorized for fishery management provides for making the detailed description of the boundaries of the territorial closure, as well as the temporal scope of the fishing ban applying to the territorial closure in the territorial ticket, or in the printed information leaflet handed over with the territorial ticket public. (Decree, Section 5.)

The crime in paragraph *(b)*, too, can be committed with direct or oblique intent. In relation to complicity, as well as aiding and abetting, I find the aforementioned considerations in regards to paragraph *(a)* authoritative. In regards to the stages of accomplishing – relying also on the considerations regarding paragraph *(a)* – purchasing the necessary tools for fishing is preparation, taking the fishing tools to the bank is attempt, and dropping the tools in the water is accomplished crime.

I analyze the problem of multiple counts, and the questions regarding their separation, in relation to paragraphs *(a)* and *(b)* together.

First of all, I would like to emphasize that according to the recent judicial practice which I do not think to be fully correct, however, poaching of fish and cruelty to animals cannot be charged in multiple count indictments even if carrying out the activity (e.g., raking, using of gillnet) causes permanent disability, death, or excessive sense of pain for the fishes. In regards to these results, no concrete references can be found at legislation level, only among the administrative regulations it is prescribed that to torture the caught fishes is prohibited, as well as that the taken and caught fishes should be treated in such a way that the physical impairment caused to them shall not exceed the limit which is minimally required by the fishing, as well as angling method. /Decree, Section 28(14)/

In my opinion, the analysis of the aforementioned questions requires legal philosophical inquiries: in this subject many legal philosophical views are known in relation to the differentiation based on pain and sensory thresholds, and to its relevancy in law. According to the theorists of one view, the line should be drawn by vertebrate animals. (DEGRAZIA 2004: 28). Also that kind of legal solution is known when the legal protection is reserved for only a subset of vertebrates: according to the *U.S. Act of 1966 on Animal Welfare* the object of crime of cruelty to animals can be only cat, dog, hamster, rabbit, monkey, guinea pig, or other warm-blooded animal, as the secretary of agriculture may determine. / 7 U.S. Code § 2132 (g) In JÁMBOR 2016: 19/

According to the view I think to be correct the discriminative criterion is the presence or absence of the capacity for the sensation of pain. To determine the answer for this question requires, of course, biological research, I surmise, however, that in case of animals belonging to the group of fishes the application of the crime of cruelty to animals would be undoubtedly reasonable if the unlawful act causes evidently substantial pain to the specimen. The aforementioned raking or the usage of gillnet could fall into this class. In these cases, thus, the conduct described in *Section 246(b)* should be considered according to the legal definition of cruelty to animals only, the crime of poaching of fish, however, would not apply. Obviously it would not be any possibility to charge multiple counts in such cases either because this would defy the principle of double jeopardy.

The conduct of poaching of fish, according to my opinion, should therefore be restricted to the activities carried out illegally, as well as in a territorial closure unlawfully. The criminal sanctioning of these

conducts is, of course, still necessary from the point of view of both nature protection and fishery management.

Based on the aforementioned considerations, according to the practice I would think to be correct, if the perpetrator carried out the usage of the prohibited tool or method without permission, the conduct would be considered as the multiple count indictment of the crime of cruelty to animals and the crime of poaching of fish as set forth in *Section 246(a)*, carrying out the same activities in territorial closure, however, would be considered as a multiple count indictment of cruelty to animals and poaching of fish as set forth by *Section 246(b)*.

By the same time, however, the judicial practice does not seem to be unequivocal in respect that theft and either paragraph *(a)* or *(b)* can be alleged in a multiple count indictment (EBH 2015. B. 24.).

In a case in Hungary, the court sentenced the defendant fishing with prohibited fishing tool for misdemeanor of accomplice in theft and misdemeanor of poaching fish to prison without suspension. /Judgment 8.B.133/2012/17 of the District Court of Szarvas, Judgement Bf.340/2013/5 of the Regional Court of Gyula. In HÁGER 2006: 37/

The imposition of this charge might presumably have adhered to the criminal record and other personal circumstances of the perpetrator too, the severity of the retribution, however, could well be considered as a 'precedent.' Above this, according to my view, the multiple count indictment of poaching of fish, theft, and the criminal offenses with explosives or blasting agents will be apply to the commitment if the perpetrator carries out catching fish as described in *Section 246(b)* with the aid of explosive or blasting agent and takes the surfaced carcasses of fishes illegally.

Poaching of fish regularly turns up as the underlying offense in crime groupings. Based on this, the activity of that person who, for financial gain or advantage, buys the fish caught and unlawfully taken by fish poachers is considered as fencing. In regards to the determination of criminal liability it is vital that the *mens rea* of the perpetrator shall encompass the unlawful killing, as well as illegal taking of the game. The court is expected to draw its conclusion by considering all circumstances of the case (e.g., the place and time of trading, the way and extent of compensation, etc.).

Also conducts involving the violation of anti-money laundering provisions turn up at the level of crime groupings. The activity of that person who converts or transfers, or uses in business activity, any asset originating from a criminal offense, punishable by prison, and

committed by another person, in order to conceal its origin, is considered as such. According to Elek, "the business activity can be running a restaurant too. In that case if the fish is used in course of this activity in order to conceal its origin, the definition of money laundering can apply to it" (ELEK 2009: 13).

CLOSING REMARKS

The new Criminal Code – unreasonably – 'devalued' the importance of legal protection of fishes. An important sign of this tendency is the likely discriminative distinction drawn between poaching of game and poaching of fish: the former Criminal Code (Act IV of 1978) regulated the conducts of fish poaching and game poaching together as one misdemeanor punished with the same punishment. The recent code defines poaching of game as a felony, punishable with maximum three years in prison, when poaching of fish is still a misdemeanor with the maximum penalty of two years in prison.

The other fundamental problem is the concurrency of cruelty to animals and poaching of fish by prohibited tools or methods, as defined in *Section 246(b)*, and the unclear relationship between the legal interests defended by these regulations. For it is not clear whether the legislator created the latter phrase in respect to the exceptional sensation of pain in the animals or the damaging effects caused to nature in such circumstances. This regulation is not unequivocal in respect to the determination of multiple counts either, or in relation to the principle of double jeopardy.

In regards to illegal fishing control exercised by the authorities, in this field creating a coordinating platform between the NFCSO and the National Fish Guard Service in 2015 is doubtlessly a progressive step which, due to its skilled personnel, in the close future is likely to turn out to be an efficient mechanism in filtering out the violations of laws damaging fish stock. For the sake of prevention and redistribution, upholding the possibility for charging on-the-spot fines, raising the limit for fines, as well as exercising regular and *ad hoc* control by the authorities could serve as a solution in all cases.

Illegal angling has to be handled from illegal fishing separately. The former one could bear touristic relevancies too which first of all, according to my view, could be mended by application of, so to speak, 'marketing instruments.' Angling competitions organized by local

governments, various fish festivals, as well as that kind of strategy, based on informing the broader public, which calls the attention of the potential perpetrators to the unlawfulness and other dangers of their activity could have eminent role in this campaign.

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